SUPREME COURT, U.S.
71 - 782
Supreme Court, U.S.
FILED
DEC 13 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Petitioner,

v.

OHIO VALLEY INSURANCE COMPANY,
Defendant,

(BUCKEYE UNION INSURANCE COMPANY,
Intervening Defendant-Respondent),

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervening Defendant-Respondent),

(KEN BAILEY, ET AL.,
Intervening Defendant-Petitioner).

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WILLIAM J. BROWN, Attorney General of Ohio
By WILLIAM M. LANE, *Special Counsel*
150 East Broad Street
Columbus, Ohio 43215
Attorneys for Petitioner, Superintendent of Insurance of Ohio

(Continued Inside Front Cover)

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdictional grounds	2
Date of judgment sought to be reviewed	2
Statutory provisions conferring jurisdiction on the Supreme Court of the United States	2
Questions presented for review	2
Constitutional provisions and statutes involved	4
Statement of the case	4
Reasons relied on for allowance of the writ	9
Summary	19
Affidavit of Service	20
Appendices	21
A. Opinions below and orders of courts below Smith v. Ohio Valley Insurance Company, Order on Motion for Rehearing Reported 44 Ohio Bar 1110 (September 20, 1971)	21
Order of Supreme Court of Ohio granting National Association of Insurance Commissioners leave to file brief amicus curiae	23
Order of the Supreme Court of Ohio issued Sept. 15, 1971	25
Smith v. Ohio Valley Insurance Company, 27 Ohio St. 2d 268 (1971)	30

Tenth District Court of Appeals, Franklin County, Ohio, Journal Entry filed April 15, 1971 ---- 41

Unreported decision of Tenth District Court of Appeals, Franklin County, Ohio, on motion for reconsideration, issued March 23, 1971 ---- 44

Unreported decision of Tenth District Court of Appeals, Franklin County, Ohio, issued February 16, 1971 ---- 47

Journal Entry of the Common Pleas Court of Franklin County, Ohio, filed December 17, 1970 ---- 64

B. Ohio Constitutional and Statutory Provisions ---- 74

Section 28, Article II, Ohio Constitution ---- 74

Chapter 3955, Ohio Revised Code ---- 74

Section 3955.01 (B) ---- 75

Section 3955.01 (C) ---- 76

Section 3955.03 ---- 77

Section 3955.12 (B) ---- 86

Section 3955.17 ---- 89

Section 3903.23, Ohio Revised Code ---- 90

C. Statutes and proceedings outside Ohio

Citation to state statutes patterned after the model act of the National Association of Insurance Commissioners ---- 92

Present insurance company insolvencies which can be affected by decision in this case ---- 94

D. Letter from Russell E. Van Hooser, Vice President and Chairman of the Executive Committee of The National Association of Insurance Commissioners 97

Table of Cases Cited

	Page
Anonymous v. Baker, 360 U.S. 287 (1959)	18
Brinkerhoff-Ferris Trust and Savings Co. v. Hill, 281 U.S. 673 (1930)	17
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	18
Mayflower Farm v. Ten Eyck, 297 U.S. 266 (1936)	11, 12
NAACP v. Alabama, 357 U.S. 449 (1958)	19
NAACP v. Button, 371 U.S. 415 (1961)	19
State ex rel Missouri Insurance Company v. Gehner, 281 U.S. 313 (1930)	17
Waugh v. Board of Trustees of University of Mississippi, 237 U.S. 589 (1915)	12, 16
Williams v. Walsh, 222 U.S. 415 (1912)	12, 16

Table of Constitutional Provisions and Statutes Cited

	Page
Amendment XIV, Section 1, Constitution of the United States	4
Section 28, Article II, Ohio Constitution	4, 7

28 U.S.C. Section 1257 (3) 2
Section 3903.23, Ohio Revised Code 4, 6
Section 3955.01 (B), Ohio Revised Code 3, 4, 6
Section 3955.01 (C), Ohio Revised Code 4, 6
Section 3955.03, Ohio Revised Code 3, 4
Section 3955.12 (B), Ohio Revised Code 4, 6, 14
Section 3955.17, Ohio Revised Code 6

IN THE

Supreme Court of the United States

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Petitioner,

v.

OHIO VALLEY INSURANCE COMPANY,
Defendant,

(BUCKEYE UNION INSURANCE COMPANY,
Intervening Defendant-Respondent),

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervening Defendant-Respondent),

KEN BAILEY, ET AL.,
Intervening Defendant-Petitioner).

Petition for Writ of Certiorari to the Supreme Court of Ohio

The Superintendent of Insurance of Ohio, and Ken Bailey, et al., hereby petition the Court for a writ of certiorari to the Supreme Court of Ohio on the basis of the facts, arguments, and authorities set forth herein.

(a) **Opinions below**

Supreme Court of Ohio

Smith v. Ohio Valley Insurance Company 27 Ohio St. 2d 268 (1971) (Case No. 71-236). Rehearing Denied September 15, 1971, reported 44 Ohio Bar 1110 (September 20, 1971).

Tenth District Court of Appeals
Franklin County, Ohio

Unreported decision issued February 16, 1971
Unreported decision issued March 23, 1971, on motion for reconsideration (Case No. 10016).

Common Pleas Court of
Franklin County, Ohio

Journal Entry filed December 17, 1970 (Case No. 241,494)

(b) **Jurisdictional Grounds**

(i) **Date of judgment sought to be reviewed**

Judgment of the Supreme Court of Ohio was rendered July 21, 1971. Thereafter a timely motion for rehearing and reconsideration was filed and, on September 15, 1971, was denied.

(ii) **Statutory provisions conferring jurisdiction on the Supreme Court of the United States**

28 U.S.C. §1257. State Courts; appeal, certiorari

"Trial judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

(c) **Questions presented for review**

(1) Can an act which (a) creates a new fund for payment in full of valid claims against an insolvent in-

surance company which became an insolvent insurer within the meaning of the act after its effective date, (b) whose stated purposes include providing "a mechanism for the payment of covered claims under certain insurance policies" and avoiding "excessive delay in payment and financial loss to claimants or policyholders because of the insolvency of an insurer" (Ohio Rev. Code §3955.03), and (c) which defines a covered claims as "an unpaid claim . . . which arises out of and is within the coverage of an insurance policy . . ., when issued by an insurer which becomes an insolvent insurer on or after the effective date of the act" (Ohio Rev. Code §3955.01 (B)), deny policyholders and claimants, whose claims on an insurance policy arose prior to the effective date of the act participation in its benefits and at the same time grant participation in its benefits to those policyholders and claimants whose claims arose after the effective date of the act, without offending the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States?

(2) Can the act described in question (1) above which additionally gives priority to expenses of providing full insurance company claim service with respect to claims against the insolvent company equal to the priority given to receiver's expenses of winding up the company's affairs over all other claims against the insolvent company's assets, be constitutionally applied to deprive claimants and policyholders, whose claims arose prior to the effective date of the act, of participation in the insolvent company's assets on an equal basis with those claimants whose claims arose thereafter?

(3) Does the unequal treatment of policyholders and claimants described in questions (1) and (2) above have any relation to the stated purposes of the act?

(4) Can a state constitutional prohibition prevail over the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States to justify the unequal treatment of policyholders and claimants described in questions (1) and (2)?

(5) If the unequal treatment of policyholders and claimants described in questions (1) and (2) can be justified by a specific state constitutional prohibition, must the state courts first decide an issue, properly made, of the applicability of the state constitutional provision to the case before it can justify the unequal treatment by the state constitutional prohibition?

(d) **Constitutional provisions and statutes involved**

(1) Amendment XIV, §1, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) Satutory provisions. Chapter 3955, Ohio Revised Code, is printed in Appendix B. The most pertinent sections of Chapter 3955 are Sections 3955.01 (B), 3955.01 (C), 3955.03, 3955.12 (B), and 3955.17. In addition, §28, Article II, Ohio Constitution and Section 3903.23, Ohio Revised Code are printed in Appendix B.

(e) **Statement of the case**

On August 12, 1970, the Superintendent of Insurance of Ohio filed a complaint seeking authority to take over

Ohio Valley Insurance Company, alleging that the company was insolvent, that it could not meet its policy obligations, and that it was in such condition that its further transaction of business would be hazardous to its policyholders, contract holders, creditors, and the public. On September 10, 1970, the Common Pleas Court of Franklin County ordered that the Superintendent of Insurance take possession of the property, business and affairs of Ohio Valley Insurance Company and rehabilitate or liquidate the same pursuant to Chapter 3903, Ohio Revised Code. On September 18, 1970, the Superintendent was ordered to rehabilitate the company and on November 13, 1970, a hearing was had at which the Court considered plans for rehabilitation of the company submitted by two interested parties. At the conclusion of the hearing, the Court found that no one had come forth with a feasible rehabilitation plan and ordered liquidation of the company. The company was decreed to be insolvent on November 27, 1970.

On June 5, 1970, the Governor of Ohio signed into law the Ohio Insurance Guaranty Act, Chapter 3955, Ohio Revised Code, and the act became effective on September 4, 1970. Chapter 3955 is patterned after the model insurance guaranty act of the National Association of Insurance Commissioners. The act creates the Ohio Insurance Guaranty Association, a non-profit unincorporated association whose membership consists of all insurers transacting and licensed to transact any kind of insurance in Ohio to which the act applies. The guaranty association is responsible for handling covered claims against an insolvent insurer and for paying valid claims. The guaranty association's payments to claimants are charges against the assets of the insolvent insurer and have the same priority against the assets that the claimants paid by the

guaranty association would have had absent Chapter 3955 (§3955.12(B)). Expenses of settling adjusting and litigating claims incurred by the guaranty association, along with the expenses of the liquidator, are given first priority among unsecured claims against the insolvent company. (§3955.12(B), §3903.23, Ohio Revised Code) Absent Chapter 3955 the expenses of settling, adjusting and litigating claims would not have been incurred by the liquidator because he has no authority to provide these insurance company services in liquidating claims. The amount by which the guaranty association's obligations exceed its recovery from the assets of the insolvent insurer is provided by assessing guaranty association members, who may then pass the assessments on to their policyholders. (§3955.17).

A claim covered by Chapter 3955 for which the guaranty association is liable is defined in §3955.01 (B) as follows:

> "(B) Covered claim means *an unpaid claim*, including one for unearned premiums, *which arises out of and is within the coverage of an insurance policy* to which sections 3955.01 to 3955.20, inclusive, of the Revised Code apply, *when issued by an insurer which becomes an insolvent insurer on or after the effective date of this act* and the claimant or insured is a resident of this state at the time of the insured event or the property from which the claim arises is permanently located in this state." (Emphasis added)

An "insolvent insurer" is defined in §3955.01 (C) as:

> "An insurer authorized to transact insurance in this state either at the time the policy was issued or when the insured event occurred, *decreed* by a court of competent jurisdiction of the state of such insur-

> ers domicile *to be insolvent, and ordered* by or pursuant to the authority of such court *to be liquidated.*" (Emphasis added)

From the language quoted above, the Superintendent of Insurance concluded that since Ohio Valley Insurance Company was formally decreed to be insolvent and ordered to be liquidated after the effective date of Chapter 3955, it became an insolvent insurer within the meaning of §3955.01(B) after the effective date of the act, and that the act, therefore, applied uniformly to all claimants against Ohio Valley Insurance Company having claims based on the coverage of a policy issued by the company, and announced his intention to so enforce the act. Buckeye Union Insurance Company, respondent herein, then *made an issue for declaratory judgment* by intervening in the insolvency proceedings.

Buckeye Union contended that the date of actual financial insolvency occurred prior to the effective date of Chapter 3955, and that if it were assessed for losses to policyholders and claimants resulting from that insolvency, the act would be retroactive as applied to Ohio Valley Insurance Company in violation of §28, Article II, Ohio Constitution, which prohibits retroactive laws. The Court of Common Pleas and the Tenth District Court of Appeals for Franklin County, Ohio both held that the date of actual financial insolvency was irrelevant to the issue of retroactivity as long as the decree of insolvency and order of liquidation occurred after the effective date of the act. Buckeye Union Insurance Company accepted this holding of the Court of Appeals by failing to cross-appeal it to the Supreme Court of Ohio. However, the Court of Appeals stated that the application of the act to claims against Ohio Valley Insurance Company which

arose prior to the effective date of the act would be a retroactive application of the act contrary to §28, Article II of the Ohio Constitution.

The Superintendent appealed this decision to the Supreme Court of Ohio, urging in substance that the General Assembly was concerned with eliminating the hardship on all policyholders and claimants caused by an insurance company insolvency, that such hardship is caused by the necessity of liquidating an insolvent company and is present regardless of the date on which an insured event took place, that the only dates relevant to the question of retroactive application of Chapter 3955 are the dates specified in Chapter 3955, which dates are the date the company is ordered to be liquidated and the date the company is decreed to be insolvent, and that Ohio Valley Insurance Company was not ordered liquidated nor decreed to be insolvent until after the effective date of Chapter 3955. The Supreme Court of Ohio declined consideration of the question of retroactivity and instead held, as a matter of statutory interpretation, that the legislature, by its language in the definition of covered claim in §3955.01(B), intended that covered claims consist only of those claims which arose after the effective date of the act and intended to exclude coverage of claims which arose before that date.

The decision of the Supreme Court of Ohio results in unequal treatment of persons having claims against Ohio Valley Insurance Company in two respects. First, one class of claimants is denied participation in the fund provided by assessment of guaranty association members while a second class of claimants is permitted access to the fund. However, both classes of claimants are in circumstances which result from having had the same misfortune of looking to an insolvent insurance company for

redress. In other words, different persons in substantially identical circumstances are being treated unequally. Second, the provisions of Chapter 3955 give preference against the assets of the insolvent company for costs of adjustment, settlement, and litigation of covered claims and provide full insurance defense services for some policyholders at the expense of other policyholders and claimants, both of which deny equal participation in the insolvent company's assets to all persons who are similarly situated.

A motion for rehearing and reconsideration was filed within the time limited by the rules of practice of the Supreme Court of Ohio. In the said motion, the Superintendent of Insurance asserted that the Court's decision was contrary to the equal protection provisions of the Constitution of the United States because it unlawfully discriminated between claimants whose claims arose prior to the effective date of Chapter 3955 and claimants whose claims arose thereafter, as described in the preceding paragraph.

It is submitted for review that the unequal treatment of policyholders and claimants described above cannot be justified (a) on the basis of its relation to the purposes of Chapter 3955, (b) on the basis of any consideration relating to retroactive application of the act, particularly where the legislature obviously considered the retroactivity problem by specifically providing that a decree of insolvency and order of liquidation occur after the effective date of the act, or (c) on any other constitutionally cognizable basis.

(f) **Reasons relied on for allowance of the writ**

Specific reliance is placed on U. S. Supreme Court Rule 19.1 (a) and the additional factors of the public

impact which the decision of the Supreme Court of Ohio will have in terms of the number of persons affected in Ohio, in terms of the monetary loss to those persons, in terms of the precedent value of the Ohio decision in insolvency liquidations pending in some of the more than 40 additional states which have enacted guaranty acts incorporating language nearly identical to the language construed by the Ohio court, and in terms of the consequent magnitude of potential personal and monetary impact on persons throughout the United States.

U. S. Supreme Court Rule 19.1 (a) provides that one reason which will be considered on a petition for certiorari is "where a state court has decided a federal question of substance not therefore determined by this Court or has decided it in a way probably not in accord with the applicable decisions of this Court." While the Supreme Court of Ohio denied the appellant's motion for rehearing and reconsideration without opinion, the only fair inference from the circumstances of the motion is that all grounds asserted therein were considered and decided by the Court. The National Association of Insurance Commissioners (NAIC) filed a motion for leave to file a brief amicus curiae supporting the appellant's motion for rehearing in the Supreme Court of Ohio. The motion of the NAIC was sustained and it filed its brief. Since the Supreme Court of Ohio considered the questions presented in the motion for rehearing to be of sufficient importance to merit consideration of a brief amicus curiae, it must be presumed that the court considered all arguments before denying the Superintendent's motion. In addition, the Supreme Court of Ohio must have specifically considered the federal constitutional argument raised in the motion for rehearing and recon-

sideration since it was urged in that motion, as it is here, that the decision of the Supreme Court of Ohio cannot stand unless the classification of policyholders and claimants created thereby is found to be a justifiable discrimination which does not violate the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States. In other words, the federal constitutional issue was decisive of the case on motion for rehearing and reconsideration.

The decision of the Supreme Court of Ohio is not "in accord with the applicable decisions of this Court." (Rule 19.1 (a)). The case of *Mayflower Farms v. Ten Eyck*, 297 U.S. 266 (1936) holds that a state may not arbitrarily classify persons to make an act prospective in operation. In *Ten Eyck*, the statute questioned was a milk control act which provided that persons engaged in the milk business who did not have well advertised product brands and were so engaged continuously from April 10, 1933, to the effective date of the act could market their products at prices one cent per quart below the fixed minimum price for well advertised brands, whereas persons who entered the milk business after April 10, 1933, could not market their products at a cut price. In holding the classification according to time to be arbitrary, the Court stated at pages 273-274 of its opinion:

> "We are referred to a host of decisions to the effect that a regulatory law may be prospective in operation and may except from its usage those presently engaged in the calling or activity to which it is directed . . . . The appellees do not intimate that the classification bears any relation to the public health generally, that the provision will discourage monopoly, or that it was aimed at any abuse cognizable by law in the milk business. In the absence of any such

> showing, we have no right to conjure up situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law."

It is submitted that the present case is one involving regulatory provisions pertaining to the insurance industry, that the classification found by the Supreme Court of Ohio has no relation to the stated purposes of Chapter 3955, Ohio Revised Code or to any abuses in the insurance industry cognizable by law, and that classification of policyholders and claimants of Ohio Valley Insurance Company is, on the principles of *Ten Eyck, supra*, arbitrary and unreasonable.

Further, it is submitted that cases holding "that a regulatory law may be prospective in operation," distinguished by the Court in *Mayflower Farms v. Ten Eyck, supra*, at 273 are also not applicable to the present case. Two typical cases holding that a regulatory law may be prospective in operation are *Waugh v. Board of Trustees of the University of Mississippi*, 237 U.S. 589 (1915) and *Williams v. Walsh*, 222 U.S. 415 (1912). In *Waugh, supra*, the Court upheld a statute which prohibited fraternity members on state supported campuses from receiving or competing for diplomas, class honors, prizes or medals. By administrative fiat, students enrolled in state supported universities prior to the act were excepted from its scope. The court upheld the classification thus created, but found it to be justified to avoid retroactivity. In *Williams v. Walsh*, the Court upheld a Kansas statute which provided criminal penalties for selling black powder for use in a coal mine in packages not containing a specific amount of powder, but excepted transactions pursuant to existing contracts of sale. In *Williams, supra*, the Court specifically referred to the criminal nature of the statute

as justifying classification to avoid retroactivity. In *Waugh, supra,* the administrative exception from the scope of the act was justifiable on the basis that students enrolled in particular colleges and universities prior to the prohibition against fraternity membership had a substantial vested interest in continuing their education at the particular college or university to avoid a loss of academic credits on transfer. In both cases, there were reasons of substance for avoiding retroactivity inasmuch as retroactive or retrospective operation of the statutes in question would have imposed substantial burdens on the classes benefited by the legislation. In the present case, no such burden would befall any policyholders or claimants if all claims against Ohio Valley Insurance Company were covered by Chapter 3955, Ohio Revised Code. On the contrary, the classification created by the Supreme Court of Ohio burdens persons whose claims are not covered by Chapter 3955, not only by denial of the benefits of Chapter 3955, but additionally by denial of equal participation in the assets of the insolvent company. Since the classification created by the Supreme Court of Ohio is not justifiable by either the purposes of the act or reasons of substance for avoiding retrospective operation of the act, it is arbitrary and violates the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States.

The impact of the incorrect decision of the Supreme Court of Ohio will be substantial both inside and outside Ohio. As of November 4, 1971, the liquidator of Ohio Valley Insurance Company had evaluated approximately 2,350 claims filed against it in an aggregate amount of approximately twenty-four million dollars. The liquidator has tentatively concluded $3,300,000 to be allowable on the claims evaluated. Of these claims, approxi-

mately 1,000 claims valued at approximately $500,000.00 are covered by Chapter 3955 as interpreted by the Supreme Court of Ohio. The liquidator has estimated that the net assets of Ohio Valley Insurance Company will approximate $1,200,000 after deduction for the liquidator's expenses and before the deduction for guaranty association expenses required by Ohio Rev. Code §3955.12(B). It is reasonable to expect that settlement and litigation expenses for the favored claimants incurred by the Ohio Insurance Guaranty Association will consume a large portion of these assets, thereby leaving the majority of the claimants with a fractional recovery of their claims ranging from a few hundred dollars to $10,000 per claimant. The assets will also be further reduced to pay insurance company services provided the preferred class of policyholders created by the Supreme Court of Ohio. In terms of individual financial hardships to a large group of Ohioans, the impact of the classification made by the Supreme Court of Ohio is therefore substantial.

The impact of the Ohio decision will not be limited to the losses suffered by individuals involved with Ohio Valley Insurance Company. One other insolvency proceeding is currently pending in the Ohio courts in which the decision of the Supreme Court of Ohio will deny equal access of the Ohio Insurance Guaranty Association funds to claimants and policyholders. That case is *Kenneth DeShetler, Superintendent of Insurance of Ohio, plaintiff v. Maine Insurance Company, defendant*, Case Number 244,358, in the Common Pleas Court of Franklin County, Ohio. In addition, many claims against insurers which existed prior to September 4, 1970 (the effective date of Chapter 3955, Ohio Revised Code) can

be expected to remain pending for five to seven years before final determination because of the delays in asserting claims permitted by applicable statutes of limitation and the delays in the courts which postpone adjudication of controversies. In this period of time, it is possible that at least one and perhaps other marginal companies will undergo insolvency liquidations, and many claimants in those proceedings will be denied equal participation in the benefits of Chapter 3955 if the decision of the Supreme Court of Ohio is permitted to stand.

Nor is the impact described above necessarily limited to Ohio. The Ohio act contains substantially the same language as the National Assoication of Insurance Commissioners State Post-Assessment Insurance Guaranty Association Model Bill. This model bill has been enacted in more than 40 states besides Ohio with language nearly identical to the language interpreted by the Supreme Court of Ohio. These enactments all occurred in 1970 and 1971. Ohio is the first state in which the courts have had occasion to interpret the coverage of the insurance guaranty act, and as of the date of this writing, no other state courts have considered the issue. However, litigation is pending in at least two states, Florida and Louisiana, and in both states the position of the Supreme Court of Ohio has been asserted by parties interested in minimizing the liability of the respective guaranty associations. In addition, the Maine Insurance Guaranty Association is expected to file a complaint for a declaratory judgment covering the question of concern in the present case. The Court is referred to Appendix C for citation of state statutes patterned after the NAIC model bill and citation of pending insolvency proceedings in which the issues of the present case have been or could be raised.

The Executive Committee of the National Association of Insurance Commissioners (NAIC) has taken the position that the decision of the Supreme Court of Ohio is contrary to the intent of the NAIC in drafting the model act and is contrary to the express provisions of the act. The Executive Committee of the NAIC has additionally expressed its support of the Superintendent of Insurance of Ohio and its concern that the Ohio decision could be given unwarranted effect as precedent in other states. A copy of a letter from the NAIC to Kenneth E. DeShetler, incumbent Superintendent of Insurance of Ohio and successor to Fred B. Smith (whose name appears in the style of the case) is appended hereto as Appendix D.

Finally, it is appropriate to comment concerning the time at which the constitutional issues herein presented were first raised and the standing of the appellants to seek review. The federal constitutional issue was not created in the Court of Common Pleas because that court held that all claims against Ohio Valley Insurance Company were within the scope of Chapter 3955, Ohio Revised Code. The tenth District Court of Appeals held that claims arising prior to the effective date of Chapter 3955 were not covered by it because to cover these claims would violate §28, Article II, Ohio Constitution, which prohibits retroactive laws. At this point, a discrimination between classes of claimants was made to avoid what the Court of Appeals considered to be retroactive operation of the statute. Lack of justification for such discrimination was not clear because of the implications of cases like *Waugh v. Board of Trustees of the University of Mississippi*, 237 U.S. 589 (1915) and *Williams v. Walsh*, 222 U.S. 415 (1912), cited above, which cases on the surface at least appear to justify classification to avoid

retrospective operation of a statute. However, the Supreme Court of Ohio refused to consider the issue of whether or not application of Chapter 3955 to the insolvency of Ohio Valley Insurance Company would be retrospective if all claims were encompassed and decided the case strictly on a statutory interpretation of the language contained in §3955.01(B). In effect, the Supreme Court of Ohio held that the legislature intended to classify claimants according to the time relationship between their claims and the effective date of Chapter 3955 whether or not encompassing all claims would have undesirable retroactive effects. At this point, a clear case of unjustifiable discrimination arose for the first time, and the equal protection issue was raised at the first opportunity in the motion for rehearing and reconsideration to the Supreme Court of Ohio. The Supreme Court of the United States has held that a federal question is timely raised in a motion for reconsideration where the question did not present itself until the decision of the state court. *Brinkerhoff-Ferris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930); *State ex rel Missouri Insurance Company v. Gehner*, 281 U.S. 313 (1930). It is submitted that if the Court should finally conclude that the Ohio Constitutional prohibition against retroactive laws could justify the discrimination between classes of claimants in this case, then this Court has jurisdiction on appeal under 28 U.S.C. §1257 (2) to hear the case and remand it to the Supreme Court of Ohio for the purpose of specifically deciding the state constitutional issue. It is further submitted (a) that the state constitutional prohibition cannot justify the discrimination in this case without a finding that the substance which invokes that prohibition meets the requirements of Amendment XIV, §1, Consti-

tution of the United States, for classification of claimants, (b) that this court has the power to determine whether there can be any constitutionally recognizable justification found for Ohio's classification of claimants, and (c) that this Court has jurisdiction to determine the case on this latter basis whether or not appellants have strictly complied with the requirements for jurisdiction on appeal that they have raised the constitutional issue at the earliest opportunity. The Court is referred to the cases of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Anonymous v. Baker*, 360 U.S. 287 (1959) in which the Court noted that it did not have jurisdiction of questions on appeal under 28 U.S.C. §1257 (2) because they were not specifically raised in lower court proceedings, and then treated the appeals as petitions for certiorari and granted the writ under 28 U.S.C. §1257 (3).

The standing of the appellants, Ken Bailey, et al. to seek review is based on personal deprivation of the benefits of participation in the new funds made available by Chapter 3955, Ohio Revised Code. The standing of the Superintendent of Insurance of Ohio is based on his duty to preserve the assets of Ohio Valley Insurance Company for the benefit of all policyholders, claimants and creditors, many of whom will be personally prejudiced by the decision of the Supreme Court of Ohio since it permits a small group of policyholders to obtain full insurance company services paid for from the assets of the company and on his duty to resist preferences which benefit only some of the policyholders and claimants to the detriment of other policyholders and claimants. The Superintendent's position is analogous to that of a trustee in bankruptcy in that he has an identity of interest with the disfavored policyholders, claimants, and creditors in preserving as much of the company's assets as possible, and

in that he is the only person who has the practical means to enforce their rights. It is submitted that these considerations are sufficient to give the Superintendent of Insurance the required standing. Similar considerations were relied on by this Court in the cases of *NAACP v. Button*, 371 U.S. 415 (1961) and *NAACP v. Alabama*, 357 U.S. 449 (1958), both of which held that the identity of interest between the NAACP and its members in the litigation and the practical problems confronting individual members in pressing their rights were sufficient to give the NAACP standing to represent the interests of its members, 371 U.S. at 428, 357 U.S. at 458-59.

(g) Summary

In summary, petitioners submit that this Court has jurisdiction to decide the questions presented on writ of certiorari, that the judgment of the Supreme Court of Ohio is contrary to Amendment XIV, §1, Constitution of the United States and should be reversed, and that the questions presented for review are substantial constitutional questions and are of nationwide public interest. Petitioners, therefore, respectfully request this Court to issue a writ of certiorari to the Supreme Court of Ohio and to set this case for argument on the merits.

WILLIAM J. BROWN,
ATTORNEY GENERAL OF OHIO

/by/ William M. Lane, Special Counsel
Attorneys for Petitioner, Superintendent
of Insurance of Ohio

STEWART & DECHANT CO., L.P.A.

/by/ Thomas H. DeChant
Attorneys for Petitioners,
Ken Bailey, et al.

AFFIDAVIT OF SERVICE

FRANKLIN COUNTY)
STATE OF OHIO) ss.

The undersigned, William M. Lane, Attorney for petitioner, Fred B. Smith, Superintendent of Insurance of Ohio, states that he has on the _____ day of _____, 1971, served by mail three printed copies of the foregoing Petition for Certiorari to the Supreme Court of Ohio on William L. Schmidt, J. Roth Crabbe, and William H. Allyn, Jr., Crabbe, Newlon, Potts, Schmidt, Brown & Jones, 42 East Gay Street, Columbus, Ohio 43215, attorneys for respondent, Buckeye Union Insurance Company; and on Arthur I. Vorys and Thomas B. Ridgley, Vorys, Sater, Seymour & Pease, 52 East Gay Street, Columbus, Ohio 43215, attorneys for respondent, Ohio Insurance Guaranty Association, being all parties required to be served.

_____
William M. Lane

Subscribed and sworn to before me this _____ day of _____, 1971.

_____
Notary Public

APPENDIX A. OPINIONS BELOW AND ORDERS OF COURTS BELOW

---

1. Smith v. Ohio Valley Insurance Company. Order on Motion for Rehearing.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, } 1971 TERM
City of Columbus. } To wit: September 15, 1971

FRED B. SMITH, SUP'T. OF INSURANCE,
Appellant.

vs.

OHIO VALLEY INSURANCE CO., ET AL.,
Appellees.

No. 71-236

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. Page .

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 15th day of September, 1971.

THOMAS L. STARTZMAN, Clerk.

2. Order of the Supreme Court of Ohio granting National Association of Insurance Commissioners leave to file brief amicus curiae.

THE SUPREME COURT OF OHIO

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,

Appellant,

vs.

OHIO VALLEY INSURANCE CO. ET AL.,

Appellees.

August 3, 1971

No. 71-236

ENTRY

On written request and for good cause shown, it is ordered that Knepper, White, Richards & Miller be given leave to file brief amicus curiae on behalf of National Assn. of Insurance Commissioners on or before August 13, 1971.

C. WILLIAM O'NEIL,
Judge.

3. Order of the Supreme Court of Ohio issued Sept. 15, 1971.

THE SUPREME COURT OF THE STATE OF OHIO

1971 TERM

To wit: July 21, 1971

THE STATE OF OHIO,
City of Columbus.

FRED B. SMITH, SUP'T. OF INSURANCE,
Appellant,

vs.

OHIO VALLEY INSURANCE CO. ET AL.,
Appellees.

No. 71-236

APPEAL FROM THE COURT OF APPEALS
for Franklin County

This cause, here on appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court

of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19___.

THOMAS L. STARTZMAN,
Clerk

/s/ SAM F. ADKINS,
Deputy

CERTIFIED COPY OF ENTRY SENT TO CLERK.
SEP. 15, 1971

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1971 TERM
To wit: July 21, 1971

FRED B. SMITH, SUP'T. OF INSURANCE,
Appellant,

vs.

OHIO VALLEY INSURANCE CO. ET AL.,
Appellees.

No. 71-236

MANDATE

To the Honorable Common Pleas Court within and for the County of Franklin, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN, Clerk.

Sept. 15, 1971.

/s/ SAM F. ADKINS, Deputy

RECORD OF COSTS

Docket Fee . . .	$20.00	Paid by William M. Lane
Docket Fee . . .	$____	Paid by _____
Docket Fee . . .	$____	Paid by _____
Printing Record . .	$____	Paid by _____
Supplemental Record	$____	Paid by _____
Sheriff's Costs . .	$____	Paid by _____
Sheriff's Costs . .	$____	Paid by _____

4. Smith v. Ohio Valley Insurance Company, 27 Ohio St. 2d 268 (1971).

SMITH, SUPT. OF INSURANCE, APPELLANT, *v.* OHIO VALLEY INS. C. ET AL., APPELLEES.

[Cite as Smith v. Ohio Valley Ins. Co. (1971), 27 Ohio St. 2d 268.]

Insurance companies—Ohio Insurance Guaranty Act—R.C. 3955.01 — Statutory construction — Claims against insolvent insurance company—Statute applicable to payment of "covered claims" only—Definition—Prospective application—Claim existing prior to effective date of Act not "covered."

1. The obligation of Ohio Insurance Guaranty Association as to the payment of existing claims against an insurance company, judicially decreed to be insolvent and ordered liquidated, pursuant to the Ohio Insurance Guaranty Act, R. C. Chapter 3955, does not include all claims existing prior to the judicial determination of insolvency and arising within thirty days of such determination, but is restricted to the payment of "covered claims," as defined by R. C. 3955.01(B).

2. A claim already in existence against an insurance company prior to the effective date of the Ohio Insurance Guaranty Act, on September 4, 1970, is not a "covered claim," as defined by R. C. 3955.01(B).

(No. 71-236—Decided July 21, 1971.)

APPEAL from the Court of Appeals for Franklin County, pursuant to the allowance of a motion to certify the record.

This case involves questions of interpretation and

constitutionality of the Ohio Insurance Guaranty Association Act, R. C. Chapter 3955 (133 Ohio Laws 2939), effective September 4, 1970, in its application to the insolvency of the Ohio Valley Insurance Company.

The pertinent facts are included in the opinion.

Mr. William J. Brown, attorney general, and *Mr. William M. Lane,* for appellant.

Messrs. Crabbe, Newlon, Potts, Schmidt, Brown & Jones and *Mr. William L. Schmidt,* for appellee, Buckeye Union Insurance Company.

Messrs. Vorys, Sater, Seymour & Pease, for appellee Ohio Insurance Guaranty Association.

Stewart & DeChant, Co., L. P. A., and *Mr. Thomas H. DeChant,* for appellees Ken Bailey et al.

LEACH, J. At issue in this case is the applicability of the Ohio Insurance Guaranty Association Act, R. C. Chapter 3955, which became effective September 4, 1970, as to claims against an insolvent insurance company (Ohio Valley Insurance Company), where such claims existed prior to September 4, 1970, where the company from December 31, 1969, on "was [continuously] insolvent in the sense that it did not possess sufficient assets with which to discharge its liabilities and in the sense that it did not possess sufficient liquid assets to meet its obligations as such obligations become due," but where the company was not decreed by a court to be insolvent and ordered liquidated until November 27, 1970.

Proceedings in this case began on August 12, 1970, when the Superintendent of Insurance of the state of Ohio, appellant herein, filed a complaint in the Common Pleas Court of Franklin County alleging that Ohio Valley was insolvent and praying for an order, pursuant to R. C. 3903.03 *et seq.*, for the rehabilitation or liquidation of that company.

After unsuccessful efforts directed toward rehabili-

tation, the Common Pleas Court, on November 13, 1970, found that further efforts to rehabilitate Ohio Valley would be futile and ordered the Superintendent to proceed to liquidate. The journal entry of the court, so finding and so ordering, was entered on November 27, 1970.

Subsequent to the filing of the complaint by the Superintendent on August 12, 1970, the Ohio Guaranty Association Act became effective. This Act created a nonprofit unincorporated association to be known as The Ohio Insurance Guaranty Association. R. C. 3955.06. The Guaranty Association includes as "member insurer[s]" anyone "who writes any kind of insurance to which this act applies * * * and is licensed to transact any insurance in this state." R. C. 3955.01(D). (Buckeye Union Insurance Company, the adversary appellee herein, is such a member insurer.)

The Act defines an "insolvent insurer" as meaning "an insurer authorized to transact insurance in this state either at the time the policy was issued or when the insured event occurred, decreed by a court of competent jurisdiction of the state of such insurer's domicile to be insolvent, and ordered by or pursuant to the authority of such court to be liquidated." R. C. 3955.01(C).

It provides that the Guaranty Association shall "be obligated to the extent of the covered claims existing prior to the determination that an insolvent insurer exists and arising within thirty days after such determination * * *." R. C. 3955.08(A)(1).

The funds from which the Guaranty Association is required to make such payment are derived from assessments against its members, the Guaranty Association being authorized to "assess member insurers separately for each account amounts necessary to pay the obligations of

the association under division (A) (1) of this section subsequent to an insolvency * * *." R. C. 3955.08(A)(3).

On November 27, 1970, the Common Pleas Court having decreed that Ohio Valley was insolvent and having ordered its liquidation, the Superintendent notified the Guaranty Association to such effect. Thereafter Buckeye, as an intervening defendant with permission of the court, sought declaratory judgment as to the respective rights of the Superintendent, the Guaranty Association and the member insurers of the Guaranty Association as to the obligation for payment of existing claims against Ohio Valley.

Guaranty Association also intervened as a party defendant, and is denominated as an appellee in this court, but has taken no adversary position as to the applicable law. A group of persons, Ken Bailey et al. (claimants), having existing claims against Ohio Valley, also intervened.

In the Common Pleas Court, it was the position of Buckeye that since Ohio Valley was *actually* insolvent before the effective date of the Ohio Insurance Guaranty Association Act, to require Guaranty Association to pay any existing claims against Ohio Valley, based on a *judicial decree* of insolvency after the effective date of the law, would be in violation of the provision of Section 28, Article II of the Ohio Constitution, providing that the "General Assembly shall have no power to pass retroactive laws."

Relying on the definition of an "insolvent insurer" in R. C. 3955.01(C), which requires (1) a court decree of insolvency and (2) a court order of liquidation, it was the position of the Superintendent and of the intervening claimants that the legislation was prospective in nature,

and not constitutionally retroactive, since the law became operative only upon the happening of an event subsequent to the effectiveness of the law, *i. e.*, the court decree.

The trial court found, as a matter of fact, that Ohio Valley, beginning December 31, 1969, was and continued to be "insolvent in the sense that it did not possess sufficient assets with which to discharge its liabilities and in the sense that it did not possess sufficient liquid assets to meet its obligations as such obligations became due." That court concluded as a matter of law that R. C. Chapter 3955 was constitutional; that it applied "to the present liquidation proceedings of Ohio Valley Insurance Company despite the fact that Ohio Valley Insurance Company was insolvent * * * prior to September 4, 1970"; that Ohio Valley "became an 'insolvent insurer' within the meaning of Chapter 3955, Ohio Revised Code, and as defined in Section 3955.01 (C), Ohio Revised Code, on November 27, 1970, which date is after the effective date of Chapter 3955, Ohio Revised Code"; and that "Ohio Insurance Guaranty Association is fully liable and obligated to handle, process and *pay all of the claims* of Ohio Valley Insurance Company pursuant to Chapter 3955, Ohio Revised Code; * * *" (Emphasis added.)

At this point, we might note that the entire focus of the case, as presented to the Common Pleas Court, concerned the obligation of Guaranty Association to pay *any* existing claims against Ohio Valley, premised on the assertion by Buckeye that such was precluded by the fact that Ohio Valley was actually insolvent prior to the effective date of the Ohio Insurance Guaranty Act. No discussion appears as to the meaning of "all of the claims" of Ohio Valley "pursuant to" R. C. Chapter 3955, as referred to by the trial court.

Upon appeal by Buckeye to the Court of Appeals, that court concluded, as stated in its opinion:

"The date of insolvency has no bearing upon the determination of whether R. C. Chapter 3955 is retroactive because the insolvency continued and existed after the effective date as well as before, so long as R. C. Chapter 3955 operates upon the existing insolvency prospectively. Accordingly, R. C. Chapter 3955 is not retroactive with regard to claims arising on or after the effective date, September 4, 1970, regardless of when the insurance policy was issued. The rights of the claimant and the obligation of the association and Buckeye with respect to such a claim all arise while the statute is in effect. There can be no retroactivity because there was no preexisting claim.

"It is the finding of this court, however, that R. C. Chapter 3955 is retroactive as to claims arising prior to September 4, 1970, from the insolvency of Ohio Valley Insurance Co., and is, therefore, to this extent, unconstitutional as applied to intervener-appellant, Buckeye Union Insurance Company, and like member insurers, in the liquidation of Ohio Valley Insurance Co., and that Ohio Insurance Guaranty Association has no duty or liability in the processing, handling, or payment of claims arising prior to September 4, 1970, out of the liquidation of Ohio Valley."

After entry of judgment to this effect by the Court of Appeals, appeal was taken to this court by the Superintendent. No cross-appeal was taken by Buckeye, which now concedes that claims which arose against Ohio Valley on or after September 4, 1970 (but prior to 30 days after the court's decree of insolvency), are required to be paid by Guaranty Association, and the Buckeye would be subject to an assessment to effectuate such payment.

This case has been extensively briefed by respective counsel as to the question of whether legislation, requiring payment by Guaranty Association of claims theretofore existing against an insurance company, judicially decreed to be insolvent after such legislation, and requiring Guaranty Association to assess other insurance companies (member insurers) to obtain the funds necessary to make such payments, constitutes a "retroactive law" within the purview of Section 28, Article II of the Ohio Constitution. Reference has been made by respective counsel to many opinions of this court interpreting such constitutional provision.[1]

Were this a case where the language employed by the General Assembly had expressly and unequivocally provided for payment by Guaranty Association of claims in existence prior to the legislation, against an insurance company judicially decreed to be insolvent after the effective date of the legislation, a complex question of constitutionality under Section 28, Article II, would arise as

---

[1]Cases cited include *Rairden* v. *Holden* (1864), 15 Ohio St. 207; *Kumler* v. *Silsbee* (1882), 38 Ohio St. 445; *Gager* v. *Prout* (1891), 48 Ohio St. 89; *Commissioners* v. *Rosche Bros.* (1893), 50 Ohio St. 103; *Miller* v. *Hixson* (1901), 64 Ohio St. 39; *Safford* v. *Ins. Co.* (1928), 119 Ohio St. 332; *Smith* v. *N. Y. C. Ry. Co.* (1930), 122 Ohio St. 45; *Cleveland* v. *Zangerle* (1933), 127 Ohio St. 91; *State, ex rel. Slaughter,* v. *Indus. Comm.* (1937), 132 Ohio St. 537; *State, ex rel. Cratty,* v. *Zangerle* (1938), 133 Ohio St. 532; *Ault* v. *Evatt* (1942), 140 Ohio St. 427; *Hearing* v. *Wylie* (1962), 173 Ohio St. 221; *General Industries* v. *Leach* (1962), 173 Ohio St. 227; *State, ex rel. Holdridge* v. *Indus. Comm.* (1967), 11 Ohio St. 2d 175; *Kilbreath* v. *Rudy* (1968), 16 Ohio St. 2d 70; and *Perk* v. *Euclid* (1969), 17 Ohio St. 2d 4.

Essentially, the Superintendent and claimants assert that the Act is "remedial in nature" and that it does not affect "substantive rights." Buckeye asserts that the Act if applied to claims against Ohio Valley in existence prior to September 4, 1970, is one which, in the words of Judge Story in the case of *Society for the Propagation of Gospel* v. *Wheeler* (1814) 2 Gall. (U. S. C. C.), 105, 139, "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed," and, therefore, "must be deemed retrospective."

to the power to assess member insurers for the cost of such payments.[2]

Such a case, however, is not presented herein. Although Guaranty Association is obligated by the terms of R. C. 3955.08(A) as to *certain* "claims existing prior to the determination that an insolvent insurer exists and arising within thirty days after such determination;" its obligation is not to "all claims" but only as to "covered claims."

A "covered claim" is specifically defined by R. C. 3955.01(B) as meaning "an unpaid claim * * * which *arises* out of and *is* within the coverage of an insurance policy to which Sections 3955.01 to 3955.20, inclusive, of the Revised Code *apply*, when issued by an insurer which becomes an insolvent insurer on or after the effective date of this Act and the claimant or insured *is* a resident of this state at the time of the insured event or the property from which the claim arises *is* permanently located in this state." (Emphasis added.)

Although the latter portion of the opinion of the

---

[2] Note that Guaranty Association is not the corporate successor of the insolvent insurance company; nor is it the liquidator. Its obligation, for the purpose of payment, is to stand in the place of the insolvent insurer. R. C. 3955.08. Upon payment to a claimant, it is then subrogated to the rights of the claimant. Its claim for reimbursement out of any available assets of the insolvent insurance company stands on a par with those of other claimants to whom full payment has not been made, *i. e.*, those claimants whose claims predate such legislation, and those claims arising more than thirty days after the court decree.

R. C. 3955.12(B) reads:

"The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by settlements of covered claims by the association or a similar organization in another state. The court having jurisdiction shall grant such claim priority equal to that which the claimant would have been entitled in the absence of Sections 3955.01 to 3955.20, inclusive, of the Revised Code against the assets of the insolvent insurer. The expenses of the association or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses."

Court of Appeals, and its journal entry, speaks of R. C. Chapter 3955 as being "retroactive" and "unconstitutional as applied to . . . claims arising prior to September 4, 1970, out of the liquidation of Ohio Valley," it appears from a more careful examination of that opinion that the Court of Appeals also held that claims which arose prior to September 4, 1970, were not included within the legislative definition of a "covered claim." As to this point, the Court of Appeals stated:

"The covered claim about which the purpose section applies, means an unpaid claim (R. C. 3955.01(B)) 'which arises out of an insurance policy' when issued by an insurer which becomes an insolvent insurer on or after the effective date of this Act . . .

"As to claims which arose before September 4, 1970, out of already existing insurance policies, issued before September 4, 1970, any attempt to make such an unpaid claim a covered claim under the chapter does violence to the very definition of a covered claim."

We are in agreement with the Court of Appeals that the definition of "covered claim" does not include claims in existence before September 4, 1970. The definition of "covered claim," as a matter of English grammar, is in the present tense — not the past tense. The statute speaks of an unpaid claim "which arises" — not one "which arose." It does not include "unpaid claims" of any insurance policy — only those as to which the provision of R. C. Chapter 3955 "apply." It speaks, not of a claimant who "was" a resident of Ohio at the time of the insured event, but of a claimant who "is" a resident of Ohio at such time.

A statute employing operative language in the present tense does not purport to cover past events of a

similar nature. As a general rule, a statute is prospective in its operation "unless its terms show clearly an intention that it should operate retrospectively."[1] *Bernier* v. *Becker* (1881), 37 Ohio St. 72, 74; *Allen* v. *Russell* (1883), 39 Ohio St. 336, 339; *Cincinnati* v. *Seasongood* (1889), 46 Ohio St. 296, 304; *Cincinnati, Hamilton & Dayton Rd. Co.* v. *Hedges* (1900), 63 Ohio St. 339, 341; *Cowen* v. *State, ex rel. Donovan* (1920), 101 Ohio St. 387. No such clear intention appears herein.

We hold, therefore, that the obligation of Ohio Insurance Guaranty Association as to the payment of existing claims against an insurance company, judicially decreed to be insolvent and ordered liquidated, pursuant to the Ohio Insurance Guaranty Act, R. C. Chapter 3955, does not include all claims existing prior to the judicial determination of insolvency and arising within 30 days of such determination, but is restricted to the payment of "covered claims," as defined by R. C. 3955.01(B).

We hold further that a claim already in existence against an insurance company prior to the effective date of the Ohio Insurance Guaranty Act, on September 4, 1970, is not a "covered claim," as defined by R. C. 3955.01(B).

---

[1] As illustrative of legislative language expressing a *clear intention* to apply its provisions retrospectively, see the statutory language in question in *State, ex rel. Slaughter*, v. *Indus. Comm.* (1937), 132 Ohio St. 537, 539:

"The provisions of this act shall apply * * * whether such injury or death occurs prior to the operative date of this act or subsequent thereto." (G. C. 3496-3, as then in effect.)

Another illustration is contained in paragraph three of the syllabus in *Hearing* v. *Wylie* (1962), 173 Ohio St. 221, which reads:

"The portion of Section 4123.519, Revised Code, reading, 'Any action pending in Common Pleas Court or any other court on the effective date of this act under Section 4123.519 of the Revised Code shall be governed by the terms of this act,' so far as it attempts to make compensable injuries which were not compensable under legislation to effect prior to November 2, 1959, is invalid under Section 28, Article II, Constitution of Ohio."

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., SCHNEIDER, HERBERT, DUNCAN, CORRIGAN and STERN, JJ., concur.

5. Tenth District Court of Appeals, Franklin County, Ohio, Journal Entry filed April 15, 1971.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Case No. 10016

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Appellee,

vs.

OHIO VALLEY INSURANCE COMPANY,
Defendant-Appellee.

(BUCKEYE UNION INSURANCE COMPANY,
Defendant-Appellant.)

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervener-Appellee.)

JOURNAL ENTRY

This cause came on to be heard upon the appeal on questions of law by the defendant-appellant, Buckeye Union Insurance Company, from the judgment of the Common Pleas Court of Franklin County, Ohio, and was submitted on the record, briefs and arguments of counsel.

Upon consideration thereof, the Court finds that in the record and proceedings aforesaid, there was error manifest upon the face of the record to the prejudice of the appellant in this, to-wit:

A. There was error on the part of the trial court in

its finding that the defendant-appellee, Ohio Insurance Guaranty Association, was fully liable and obligated to handle, process and pay all claims of Ohio Valley Insurance Company pursuant to Chapter 3955 of Ohio Revised Code for the reason that it is the finding and judgment of this Court that said Chapter 3955 of the Ohio Revised Code is retroactive as to claims arising prior to September 4, 1970, from the insolvency of the Ohio Valley Insurance Company and is therefore to this extent, unconstitutional as applied to appellant, Buckeye Union Insurance Company, and like member insurers in the liquidation of the Ohio Valley Insurance Company and that Ohio Insurance Guaranty Association has no duty or liability in the processing, handling or payment of claims arising prior to September 4, 1970, out of the liquidation of Ohio Valley Insurance Company.

B. In all other respects, the judgment and finding of the Court of Common Pleas of Franklin County Ohio is hereby affirmed.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that so much of the judgment of the Common Pleas Court of Franklin County, Ohio, heretofore rendered in this cause be and the same is hereby reversed to the extent that it imposes an obligation on the defendant-appellee, Ohio Insurance Guaranty Association, to process, handle or pay claims arising prior to September 4, 1970, out of the liquidation of defendant, Ohio Valley Insurance Company, and in all other respects said judgment is affirmed. It is further ordered that the motion filed in this Court by the appellees for reconsideration of the Court's decision herein be and the same is hereby overruled. It is further ordered that this cause is remanded to the Court of Common Pleas of Franklin County Ohio for further proceedings according to law

and in conformity with this judgment, including the issuance of any restraining order or injunction which may be necessary; that appellees shall pay the costs of this proceeding taxed at $, and a special mandate issue to the Common Pleas Court of Franklin County, Ohio.

/s/ TROOP
Judge

/s/ STRAUSBAUGH
Judge

/s/ WHITESIDE
Judge

APPROVED:

WILLIAM J. BROWN
ATTORNEY GENERAL OF OHIO
Attorney for Plaintiff-Appellee
/by/ William M. Lane, Special Counsel

VORYS, SATES, SEYMOUR & PEASE
Attorneys for Intervener-Appellee
Ohio Insurance Guaranty Association
/by/

STEWART & DECHANT
Attorneys for Intervening-Appellee
Ken Bailey, et al
/by/ Thomas H. DeChant

CRABBE, NEWLON, POTTS, SCHMIDT;
BROWN & JONES
Attorneys for Defendant-Appellant
Buckeye Union Insurance Company
/by/ William L. Schmidt.

6. Unreported decision of Tenth District Court of Appeals, Franklin County, Ohio, on motion for reconsideration, issued March 23, 1971.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 10016

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Appellee,

vs.

OHIO VALLEY INSURANCE COMPANY,
Defendant-Appellee.

(BUCKEYE UNION INSURANCE COMPANY,
Defendant-Appellant.)

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervener-Appellee.)

DECISION
Rendered on March 23, 1971

MR. WILLIAM J. BROWN, Attorney General,

MR. WILLIAM M. LANE, Special Counsel,
150 East Broad Street,
Columbus, Ohio,
For Plaintiff-Appellee.

VORYS, SATER, SEYMOUR & PEASE,
MR. ARTHUR VORYS and
MR. THOMAS B. RIDGLEY,
52 East Gay Street,
Columbus, Ohio,
For Intervener-Appellee
Ohio Insurance Guaranty Association.

CRABBE, NEWLON, POTTS, SCHMIDT,
BROWN & JONES,
MR. WILLIAM L. SCHMIDT,
MR. J. ROTH CRABBE, and
MR. WILLIAM H. ALLYN, JR.,
42 East Gay Street,
Columbus, Ohio,
Defendant-Appellant
Buckeye Union Insurance Company.

STEWART & DeCHANT,
MR. THOMAS H. DeCHANT,
1014 Hippodrome Building,
Cleveland, Ohio 44114,
For Intervening-Appellees
Ken Bailey et al.

PER CURIAM.

Plaintiff-appellee, the Superintendent of Insurance of Ohio, urges reconsideration of the decision of this court issued February 16, 1971.

Examination of the memorandum offered in support of the application indicates reiteration, with a slightly different emphasis, of the basic arguments advanced as a basis for the appeal in the first instance. The court was well aware of the importance, to the whole State of Ohio, of the matter litigated, and carefully considered each argument propounded by the attorney general.

A new issue appears to be raised by the memorandum contra and the reply thereto relative to a lack of supervision on the part of the superintendent as to Ohio Valley. No such matter was before the trial court, and most clearly is not before this court on review.

The emphasis given by the attorney general in this memorandum that the creation of Ohio Insurance Guaranty was for the purpose of offering procedural assistance, or to provide a mechanism, in meeting an industry

problem, was not overlooked by this court. The court is aware of the labels provided by the legislature, but as pointed out, that device is prospective and does not overcome the retroactive result of the enactment of the statute.

It is noted also, and again, reserve accumulation to meet the insolvencies of "member" companies did not begin until February 28, 1971, and furthermore, the record before this court did not show that any premium had been increased by Buckeye, or any other member, pursuant to R. C. 3955.17, which leaves only one conclusion, and that is that the member companies must presently meet the burden imposed by the insolvency of Ohio Valley prior to the effective date of the statute. And, even though recoupment may come later, which presently is a matter of surmise, the existing claimants of Ohio Valley at the time the act became effective would receive a new right if the retroactive features of the act were allowed to stand.

The application for reconsideration is denied and dismissed. The former decision of this court is affirmed. A matter of such moment should rightly be left to the wisdom of the Supreme Court of Ohio.

TROOP, P. J., STRAUSBAUGH and WHITESIDE, JJ., concur.

7. Unreported decision of Tenth District Court of Appeals, Franklin County, Ohio, issued February 16, 1971.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 10016

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Appellee,

vs.

OHIO VALLEY INSURANCE COMPANY,
Defendant-Appellee.
(BUCKEYE UNION INSURANCE COMPANY,
Defendant-Appellant.)
(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervener-Appellee.)

DECISION

Rendered on February 16, 1971

MR. WILLIAM J. BROWN, Attorney General,
MR. WILLIAM M. LANE, Special Counsel,
150 East Broad Street,
Columbus, Ohio,
For Plaintiff-Appellee.

VORYS, SATER, SEYMOUR & PEASE,
MR. ARTHUR VORYS and
MR. THOMAS B. RIDGLEY,
52 East Gay Street,
Columbus, Ohio,
For Intervener-Appellee
Ohio Insurance Guaranty Association.

CRABBE, NEWLON, POTTS, SCHMIDT, BROWN & JONES,
MR. WILLIAM L. SCHMIDT,
MR. J. ROTH CRABBE, and
MR. WILLIAM H. ALLYN, JR.,
42 East Gay Street,
Columbus, Ohio,
For Defendant-Appellant
Buckeye Union Insurance Company.

STEWART & DeCHANT,
MR. THOMAS H. DeCHANT,
1014 Hippodrome Building,
Cleveland, Ohio 44114,
For Intervening-Appellees
Ken Bailey, et al.

TROOP, P. J.

This appeal, on questions of law, is from the "Declaratory Judgment Entry," filed December 17, 1970, in the Court of Common Pleas of Franklin County.

On August 12, 1970, the Superintendent of Insurance for the State of Ohio filed a complaint against the Ohio Valley Insurance Company, a fire and casualty insurance company organized and existing under the laws of Ohio, praying for an order finding that sufficient cause exists for the rehabilitation or liquidation of the defendant company. Upon motion a show cause order was directed to Ohio Valley pursuant to R. C. 3903.03 et seq., on August 24, 1970.

Plaintiff alleges, Paragraph 3 of the petition, that a preliminary audit of the company showed that the liabilities of the company exceed the total amount of the liabilities shown on the financial statement for the year ending December 31, 1969, and which at audit time,

and on December 31, 1969, was an amount in excess of the assets, and that the cash flow of Ohio Valley had been deteriorating each month during the year 1970.

The transcript of the docket and journal entries reflects the filing of a variety of pleadings and includes the record of the addition of many parties by way of the sustaining of motions to intervene, one of which was the Ohio Insurance Guaranty Association. No purpose could be served by a review of all of this detail. The record events significant to this appeal, two in number, will be noted particularly. A decree of insolvency was entered by the trial court, November 27, 1970, in which Ohio Valley was found to be insolvent "as of the date of this order." Following a motion requesting leave, filed December 9, 1970, Buckeye Union Insurance Company was permitted to file a cross-complaint for a declaratory judgment. These two procedural events present the nub of this appeal.

Before the filing of Buckeye's cross-complaint the superintendent had been ordered to take possession of the property and business affairs of Ohio Valley, and to rehabilitate or liquidate pursuant to R. C. 3903 (September 10, 1970), and was specifically ordered to liquidate the company on November 13, 1970.

By order entered December 9, 1970, the trial court set the matter of the declaratory judgment, asked by Buckeye, for hearing on December 15, 1970. An examination of the declaratory judgment entry of the court, filed December 17, 1970, the judgment from which this appeal is taken, indicates that procedural and pleading problems, and technical hurdles, were removed by stipulation of counsel at the time of hearing. The cross-complaint of Buckeye and the answer of intervener Ohio Insurance Guaranty Association, especially Paragraphs 1, 2, and 3 of the prayer, point up the essential issues to be re-

solved by declaratory judgment. Reference is particularly to those pleadings, and detail found in other cross-complaints and answers noted but not discussed.

Buckeye sought "a determination and declaration as to the rights, duties, obligations and liabilities, if any," as to Buckeye, the Superintendent of Insurance, and Ohio Insurance Guaranty Association, and particularly asked the trial court to order and adjudge that:

1. Ohio Valley was insolvent prior to the effective date of R. C. Chapter 3955 (September 4, 1970)
2. A temporary order issue restraining Ohio Insurance Guaranty from levying any assessments on Buckeye for any purpose arising from the insolvency of Ohio Valley, and for an order restraining the superintendent from the exercise of any powers under R. C. 3955.10 in connection with the liquidation of Ohio Valley.

The answer of Ohio Insurance Guaranty to the cross-complaint of Buckeye carries a prayer of a tone similar to that in the Buckeye complaint. The intervener Ohio Insurance Guaranty wants also a determination of rights, its own along with those of the superintendent and Buckeye. More particularly, Ohio Insurance Guaranty asks the court to decide whether or not R. C. Chapter 3955 applies to the insolvency of Ohio Valley, and further, if the court should determine that it does apply, to order Ohio Insurance Guaranty to carry out all rights, duties, and obligations included in R. C. Chapter 3955, and if the court finds to the contrary that it permanently restrain Ohio Insurance Guaranty from operating with respect to the insolvency of Ohio Valley.

The plaintiff, Superintendent of Insurance of Ohio, filed an answer to the cross-complaint of the intervener Buckeye. It contains many admissions relative to the procedural steps taken by the superintendent with re-

spect to Ohio Valley. The detailed recital contained in the answer appears to be completely accurate as to the steps taken. Reference is to the answer filed December 15, 1970, for this detail, in order to avoid repetition at this point. The superintendent alleges that he is without information to know for a certainty when Ohio Valley became insolvent, and that he cannot know to a certainty the amount of any assessment which Buckeye may be asked to pay, nor does he know with certainty the actions of Ohio Insurance Guaranty Association. A general denial except as to specific admissions is carried in the superintendent's answer.

Plaintiff, the superintendent, prays for a determination of rights, duties, etc., as to the two interveners, of the superintendent generally under the chapter, and as liquidator of Ohio Valley, as well as those Buckeye and Ohio Insurance Guaranty, and specifically that the court determine that Ohio Valley became an "insolvent insurer" as defined in R. C. 3955.01 (C), "after the effective date of the Ohio Insurance Guaranty Act, * * *."

The "Declaratory Judgment Entry" of the trial court, filed December 17, 1970, contains rulings and orders with reference to many matters. It recites certain formalities accomplished by agreement and stipulation. The trial court lists the pleadings before the court at the time of hearing. There are several noted in addition to those which this court notes ante.

Reference is to the judgment entry of the trial court for detail as to its findings and orders. Without any attempt to improve on the language of the court, and at the risk of oversimplification, the orders and declarations, important to this review, set out in the judgment and decree, may be summarized as follows:

(a) Ohio Valley Insurance Company was insolvent

on December 31, 1969, "in the sense that it did not possess sufficient assets with which to discharge its liabilities," and in the sense that "it did not possess sufficient liquid assets to meet its obligations as they became due;"

(b) Ohio Valley continued to be insolvent in both senses from December 31, 1969 to November 27, 1970,

(c) R. C. Chapter 3955 is constitutional,

(d) R. C. Chapter 3955 applies to the present liquidation proceedings of Ohio Valley despite the fact that it was insolvent, in both senses as noted, prior to September 4, 1970, the date upon which R. C. Chapter 3955 became effective, having become an "insolvent insurer" as defined in R. C. 3955.01 (C) on November 27, 1970, after the effective date of the chapter,

(e) Ohio Insurance Guaranty is fully liable to handle and pay all claims of Ohio Valley pursuant to R. C. Chapter 3955.

Both motions for restraining orders requested by Buckeye were denied.

The appellant, Buckeye, bottoms its appeal from the judgment, or decree, December 17, 1970, upon a single assignment of error, the complete text of which appears on page 4 of its brief. The attack is upon the various facets of the judgment outlined in the paragraph ante. Briefly summarized, appellant contends that the trial court erred in holding R. C. Chapter 3955 constitutional as applied to Ohio Valley, and consequently, to Buckeye, and in applying it to the liquidation of that company despite the fact that the court found Ohio Valley to be insolvent on December 3, 1969, and further, in holding that Ohio Valley became an "insolvent insurer" in the meaning of the chapter on November 27, 1970, and therefore, that Ohio Insurance Guaranty was charged with the

handling and payment of the claims of Ohio Valley pursuant to the provisions of R. C. 3955.01, etc.

Section 28, Article II, of the Constitution of Ohio provides the nub of appellant's argument. It reads, in part, as follows:

> "The General Assembly shall have no power to pass retroactive laws * * *."

Counsel for the appellant, Buckeye, urge, that as to Buckeye, R. C. Chapter 3955 is retroactive legislation and, therefore, it is unconstitutional as applied to Ohio Valley and consequently as to Buckeye, a "member insurer" of Ohio Insurance Guaranty Association with resultant duties and obligations imposed by the statute.

Consistent with the position taken throughout the proceedings, and as set forth in pleadings, the attorney general as counsel for the plaintiff, the superintendent, maintains that R. C. Chapter 3955 is constitutional, applicable, and prospective in substance.

Ohio courts have labored with the problems presented by claimed legislative infractions of the constitutional limitation prescribed by Section 28, Article II. An early case, although not the earliest, dealing with the problem is *Commissioners* v. *Rosche Bros.* (1893), 50 Ohio St. 103. Like many Ohio cases *Rosche* deals with tax legislation. The basic proposition coming from the case, stated in the syllabus, but stated at some greater length at page 111, is as follows:

> " ' * * * every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.' "

The decision indicates that this rule comes from an early pronouncement of Judge Story approved by the Ohio

Supreme Court in *Rairden et al.* v. *Holden,* Admr. (1864), 15 Ohio St. 207.

From these early decisions to very modern ones the fundamental rules have not varied. *Kilbreath* v. *Rudy* (1968), 16 Ohio St. 2d 70, deals with Section 28, Article II, saying that it "has application to laws affecting substantive rights, and has no reference to laws of a remedial nature providing rules of practice, courses of procedure or methods of review." *Kilbreath* is concerned with the constitutionality of the "long-arm statute," and assists with definitions, page 72, as follows:

> "* * * Substantive law is that which creates duties, rights and obligations, while procedural or remedial law prescribes the methods of enforcement of rights or obtaining redress. * * *"

This decision refers to, and follows, *Holdridge* v. *Indus. Comm.* (1967), 11 Ohio St. 2d 175, which decision uses essentially the same language as found in *Kilbreath* (page 178).

This bit of background charts the course of this discussion in the direction of the specific question here to be resolved. Is R. C. Chapter 3955, retroactive legislation, at least as to Buckeye, in the instance of Ohio Valley, or is it merely retrospective, or even prospective?

Chapter 3955 creates the Ohio Insurance Guaranty Association and requires insurers who write certain kinds of insurance, R. C. 3955.05, to become members of the association. R. C. 3955.03 announces the purposes to be accomplished by R. C. 3955.01 through 3955.20, "to provide a mechanism for the payment of covered claims," "avoid excessive delay in payment and financial loss to claimants or policyholders because of the insolvency of an insurer," etc. R. C. 3955.04 requires that the statute be construed liberally to effect those purposes, and R. C. 3955.06 requires those certain insurers to remain mem-

bers of the newly created guaranty association as a condition of their authority to transact insurance business in this state.

The fundamental purpose of the legislation before this court is most assuredly worthy. A liberal interpretation cannot avoid consideration of the constitutionality of the act, generally, or as to its effect upon Buckeye, the latter being the only question raised on this appeal.

Necessary basic concepts bearing upon the question to be resolved on this appeal are reasonably clear. If legislation is retroactive it is because it relates to a prior time, that it expressly affects an act done prior to the effective date of the act, or that it is in fact effective prior to passage. Legislation can be retrospective without being retroactive in that it merely takes a view in the direction of the past, is contemplative of the past without affecting it. The ideal for legislative enactment, presenting no problem for courts, is that it is entirely prospective, relating to the future and effective only in the future.

R. C. Chapter 3955 is new for Ohio. It is relatively new to other jurisdictions. Decision law offers little help in interpretation. Examination of pertinent portions of the act is necessary. The whole chapter is important but particular attention is directed to quoted portions. Two definitions found in R. C. 3955.01 read as follows:

> "(B) 'Covered claim' means an unpaid claim, * * * which arises out of and is within the coverage of an insurance policy to which sections 3955.01 to 3955.20, inclusive, of the Revised Code apply, when issued by an insurer which becomes an insolvent insurer on or after the effective date of this act and the claimant or insured is a resident of this state at the time of the insured event or the property from which the claim arises is permanently located in this state."

"(C) 'Insolvent insurer' means an insurer authorized to transact insurance in this state either at the time the policy was issued or when the insured event occurred, decreed by a court of competent jurisdiction of the state of such insurer's domicile to be insolvent, and ordered by or pursuant to the authority of such court to be liquidated."

The legislature created the Ohio Insurance Guaranty Association by the enactment of R. C. Chapter 3955, and outlines its powers in R. C. 3955.08. Subsection (A) contains the "shall" portion of those powers and duties, as follows:

"(A) The Ohio insurance guaranty association shall:

"(1) Be obligated to the extent of the covered claims existing prior to the determination that an insolvent insurer exisits * * *;

"(2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent;

"(3) Allocate claims paid and expenses incurred * * *, and assess member insurers separately for each account amounts necessary to pay the obligations of the association under division (A) (1) of this section subsequent to an insolvency, * * *. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year on the kinds of insurance in the account bears to the net direct written premiums of all members insurers for the preceding calendar year on such kinds of insurance."

Examination of all of R. C. Chapter 3955 reveals an intention to create an agency with broad powers, many of which are clearly prospective and some which are

predicated upon a distinctly retrospective approach. The retrospective look is noted in the definition of a "member insurer" (R. C. 3955.01 [D]), such being one "licensed to transact any insurance in this state." R. C. 3955.11 is both retrospective and prospective. Member insurers are required to accumulate "a special surplus insolvency fund," to meet the obligations imposed by the chapter, which fund shall be increased each year, a clearly prospective provision, which shall be 1½% of the direct written premiums for the preceding calendar year. As to this case, reserve accumulations begin the last day of February 1971, calculated on the experience of 1970, which is at least a retrospective view, if not retroactive.

The attorney general, as counsel for the superintendent, attempts to meet head-on the contention of the appellant, Buckeye, that the applicable portions of R. C. Chapter 3955 are retroactive. The attorney general cites and relies upon State, ex rel. *Holdridge*, v. *Indus. Comm.* (1967), 11 Ohio St. 2d 175. Note the language of the court, at page 178, as follows:

> "It is doubtful if a perfect definition of 'substantive law' or 'procedural or remedial law' could be devised."

The validity of that proposition is firmly established when a court is confronted with the provisions of R. C. Chapter 3955. The court, in *Holdridge*, continues, as follows:

> "However, the authorities agreed that, in general terms, substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress."

Appellee, the superintendent, asks for a liberal interpretation of the statute, as directed by R. C. 3955.04, and supports the request by citing and quoting from *The State, ex rel. The National Mutual Ins. Co., v. Conn, Supt.*

of Insurance (1927), 115 Ohio St. 607, Syllabus 4, which emphasizes that the insurance business is impressed with a public purpose. Most assuredly that interest looms large in the insurance business of this modern day. Counsel for the superintendent appears to argue that this compelling public interest necessitates the conclusion that R. C. Chapter 3955 does not "create duties, rights, or obligations," but instead "provides procedural assistance in obtaining redress for persons who have rights against insolvent insurance companies." (Brief, 5.) Reference follows to *Holdridge*, supra, presumably as illustrative of the "procedural" kind of legislation.

Holdridge is an industrial commission case. Two statutes defining the loss of both eyes as permanent and total disability are the concern of the court. In reaching the conclusion that the laws were procedural the court advances a rather unique proposition, page 178, as follows:

> * * * It follows, therefore, that since the prima facie proof factor concerned only the manner of arriving at a fact conclusion, upon which the substantive law would operate, it was itself procedural or remedial rather than substantive."

The attorney general moves from the reference to *Holdridge* to two arguments in support of the position that R. C. Chapter 3955 is procedural. These are, (1) it "provides procedural assistance in obtaining redress for persons who have rights against insolvent insurance companies," and (2) the "ultimate cost burden is borne by the general public * * *."

The legislative pronouncement of purpose, in R. C. 3955.03, encourages the first argument of counsel. It says a purpose is "to provide a mechanism for the payment of covered claims under certain insurance policies." Stand-

ing alone such language is prospective in nature, and if the operation of the device for payment was limited to the future the question here for review and to be resolved could be disposed of quickly. And, if in fact there were evidence to prove the second line of argument, that the public has or will pay for the claims arising out of the insolvency of Ohio Valley, both of the propositions advanced could be accepted as valid.

The "covered claim" about which the purpose section speaks, "means an unpaid claim" (R. C. 3955.01 [B]) "which arises out of" "an insurance policy" "when issued by an insurer which becomes an insolvent insurer on or after the effective date of this act * * *."

As to "claims" which arose before September 4, 1970, out of already existing insurance policies, issued before September 4, 1970, any attempt to make such an "unpaid claim" a "covered claim" under the chapter does violence to the very definition of a covered claim. The temptation to try to make coverage valid is encouraged by the provision that insolvency accrues only upon the declaration of a competent court that it is so. (R. C. 3955.01 [C].) Reasoning in this direction produces the conclusion that Ohio Insurance Guaranty provides only procedure.

It is recalled that the trial court found that Ohio Valley was, in fact, insolvent on December 31, 1969. (Ante, court's decree.) Assume a substantial personal injury claim for which Ohio Valley was liable; the event giving rise to the injury occurred long before December 31, 1969, but remained unpaid because Ohio Valley did not have the cash to meet its current obligations, which the trial court said it could not. At the time of the event neither the insured, liable for the injury, nor the injured claimant, had any reason to look anywhere for assistance

except to Ohio Valley, the insolvent, never a "member insurer," insurance carrier. The only substantive right either insured or claimant had is to a proportionate share in the assets of Ohio Valley, which was insolvent, in two senses, which means that the claim could not be satisfied in full.

The translation of our hypothetical "unpaid claim" into a "covered claim," says the attorney general, occurred November 27, 1970, when the trial court decreed the insolvency of Ohio Valley, after the effective date of the act. On that day then the holder of the unpaid claim now has an entirely new right, a right to recover the full face value of his claim against Ohio Valley. The right to receive a portion of the assets of Ohio Valley is enhanced by the difference between that proportionate amount and the full amount of the claim. Such a right is substantive and not procedural.

The "public pays" proposition of the attorney general requires attention. As noted previously, there is much of R. C. Chapter 3955 which is prospective. Legislative provision for an accumulating special surplus insolvency fund is such a provision. (R. C. 3955.11). But there is now no existing fund and accumulation will not begin until the last of February 1971. The responsibility of a member insured to provide the surplus reserve may result in increased premiums. R. C. 3955.17 invited the increase because the reasonableness of a rate increase for that purpose is indicated. How then will the "covered claims" of Ohio Valley be paid? By assessment imposed by Ohio Insurance Guaranty on the member insurers by virtue of R. C. 3955.08 (A) (3). The brand-new, possibly unknown and unanticipated right of a claimant to be paid in full must be met by a brand-new duty or obligation resting not on the public, or premium payer, but on

the members who have at this juncture, had no chance to provide a surplus fund or increase rates.

Says *Holdridge*, a substantive right is that which "creates duties, rights, and obligations." It is conceded that R. C. Chapter 3955 is intended to be coordinated with R. C. Chapter 3903 which provides for the possible rehabilitation of an insurance carrier as well as liquidation. As to Ohio Valley, which was in fact to be liquidated, R. C. Chapter 3955 operates retroactively, giving claimants new rights and imposing on members of Ohio Insurance Guaranty new duties and liabilities.

There is no Ohio case law squarely in point. Many decisions deal with the regulatory powers of the superintendent and the department of insurance. Frequently the Supreme Court has dealt with the licensing and certification functions of the department and in these instances quite commonly attention is called to the "impressed with a public use" factor in the insurance business. Typical of this group of decisions is the one cited by the attorney general, *The State, ex rel. The National Mutual Ins. Co.*, v. *Conn, Supt. of Insurance* (1927), 115 O.S. 607, and others, such as *The State, ex rel. Federal Union Ins. Co.*, v. *Warner, Supt. of Ins.* (1934), 128 O.S. 261, and *The State, ex rel. The Clinton Mutual Ins. Assn.*, v. *Bowen, Supt. of Ins.* (1937), 132 O.S. 583.

The Supreme Court has also considered the possible retroactive effect of legislation in matters relating to the insurance business. Appellant herein cites *Safford, Supt. of Ins.*, v. *Metropolitan Life Ins. Co.* (1928), 119 O.S. 332, which involves tax legislation affecting insurance companies. There was legislation assessing a new "tax upon the business done" by insurance companies. The tax was at a rate and upon the "gross amount of premiums received by it in this state during the preceding calendar

year" as shown by the annual statement as submitted. The tax was held to be retroactive, and the court held:

> "1. A statute which creates a new obligation in respect to transactions or considerations already past is violative of Article II, Section 28, of the state constitution, which forbids the enactment of retroactive laws by the general assembly."

While not squarely in point the decision does indicate that the "public use" does not entirely supersede a consideration of an effect ex post facto in nature.

This court accepts the finding of the trial court that Ohio Valley was, in fact, insolvent in two senses on December 31, 1969. This court has no quarrel with the trial court in holding that R. C. Chapter 3955 is constitutional, although such a decision is not necessary to the result reached in the instant case.

The date of insolvency has no bearing upon the determination of whether R. C. Chapter 3955 is retroactive because the insolvency continued and existed after the effective date as well as before, so long as R. C. Chapter 3955 operates upon the existing insolvency prospectively. Accordingly, R. C. Chapter 3955 is not retroactive with regard to claims arising on or after the effective date, September 4, 1970, regardless of when the insurance policy was issued. The rights of the claimant and the obligation of the association and Buckeye with respect to such a claim all arise while the statute is in effect. There can be no retroactivity because there was no pre-existing claim.

It is the finding of this court, however, that R. C. Chapter 3955 is retroactive as to claims arising prior to September 4, 1970, from the insolvency of Ohio Valley Insurance Co., and is, therefore, to this extent, unconstitutional as applied to intervener-appellant, Buckeye

Union Insurance Company, and like member insurers, in the liquidation of Ohio Valley Insurance Co., and that Ohio Insurance Guaranty Association has no duty or liability in the processing, handling, or payment of claims arising prior to September 4, 1970, out of the liquidation of Ohio Valley.

For the reasons assigned the judgment of the trial court is affirmed in part and reversed in part, as indicated, and the cause is remanded to the trial court for further proceedings according to law, and in conformity with this decision, including the issuance of any restraining order, or injunction, which may be necessary.

STRAUSBAUGH and WHITESIDE, JJ., concur.

10. Journal Entry of the Common Pleas Court of Franklin County, Ohio, filed December 17, 1971.

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Case No. 241,494

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,

Plaintiff,

v.

OHIO VALLEY INSURANCE COMPANY, ET AL.,

Defendants.

DECLARATORY JUDGMENT ENTRY

This cause came on for hearing upon the Motion of William J. Tavenner for leave to intervene and on the Motion of defendants, Ken Bailey, et al., for leave to file their Cross Complaint herein for Declaratory Judgment. Upon consideration thereof, the Court finds the Motion of William J. Tavenner for leave to intervene well taken and that the same should be, and hereby is, sustained and the said William J. Tavenner shall be, and hereby is, granted leave to intervene as a party defendant herein. The Court also finds that the Motion of the defendants, Ken Bailey, et al., for leave to file their Cross Complaint herein for Declaratory Judgment well taken and that the same should be, and hereby is, sustained, and that said Cross Complaint shall be filed instanter.

Thereafter, it was agreed and stipulated by and among counsel for plaintiff, Fred B. Smith, Superintendent of Insurance of Ohio, defendant Ohio Insurance Guaranty Association, defendant Buckeye Union Insurance Com-

pany, and the defendants, Ken Bailey, et al., that defendants Buckeye Union Insurance Company and Ohio Insurance Guaranty Association waive the filing of answers to the Cross Complaint for Declaratory Judgment of the defendants, Ken Bailey, et al., and that the averments contained in the Answer of the plaintiff Fred B. Smith, Superintendent of Insurance of Ohio, to the Cross Complaint for Declaratory Judgment of the defendant, Buckeye Union Insurance Company, shall be deemed filed as the Answer of the plaintiff, Fred B. Smith, Superintendent of Insurance of Ohio, to the Cross Complaint for Declaratory Judgment of the defendants, Ken Bailey, et al. The Court approves and accepts such stipulation and hereby makes it a formal part of this order.

Thereafter, this cause came on for hearing upon the Cross Complaint for Declaratory Judgment of the defendant Buckeye Union Insurance Company, the Cross Complaint for Declaratory Judgment of the defendants, Ken Bailey, et al., the request for relief set forth in the answer of the defendant, Ohio Insurance Guaranty Association, and the request for relief set forth in the answer of the plaintiff Fred B. Smith, Superintendent of Insurance of Ohio, to the Cross Complaint of the defendant, Buckeye Union Insurance Company and of the defendants, Ken Bailey, et al., and the Court, upon consideration thereof and of the pleadings, the evidence, arguments and authorities presented by counsel, finds as follows:

1. That on December 31, 1969, defendant, Ohio Valley Insurance Company, was insolvent in the sense that it did not possess sufficient assets with which to discharge its liabilities and in the sense that it did not possess sufficient liquid assets to meet its obligations as such obligations became due; and that Ohio Valley Insurance Com-

pany continued to be insolvent in both senses from that date to November 27, 1970, the date of the Judgment Decree of Insolvency previously entered herein;

2. That Chapter 3955, Ohio Revised Code, (The Ohio Insurance Guaranty Association Act) is constitutional;

3. That Chapter 3955, Ohio Revised Code, applies to the present liquidation proceedings of Ohio Valley Insurance Company despite the fact that Ohio Valley Insurance Company was insolvent in both senses described in paragraph #1 hereof prior to September 4, 1970, the effective date of Chapter 3955, Ohio Revised Code;

4. That Ohio Valley Insurance Company became an "insolvent insurer" within the meaning of Chapter 3955, Ohio Revised Code, and as defined in Section 3955.01 (C), Ohio Revised Code, on November 27, 1970, which date is after the effective date of Chapter 3955, Ohio Revised Code.

5. That defendant, Ohio Insurance Guaranty Association is fully liable and obligated to handle, process and pay all of the claims of Ohio Valley Insurance Company pursuant to Chapter 3955, Ohio Revised Code;

6. That the Motion of defendant Buckeye Union Insurance Company for a temporary restraining order prohibiting the defendant Ohio Insurance Guaranty Association from levying any assessment against defendant Buckeye Union Insurance Company for expenses incurred in settlement of or in the payment of claims arising by reason of the insolvency of Ohio Valley Insurance Company is not well taken and that such temporary restraining order should not be granted.

7. That the Motion of defendant Buckeye Union Insurance Company for a temporary restraining order restraining Fred B. Smith, Superintendent of Insurance of Ohio, in charge of liquidation proceedings of Ohio Valley Insurance Company from executing any of the powers con-

ferred upon him by Section 3955.10, Ohio Revised Code, with respect to the Certificate of Authority of defendant Buckeye Union Insurance Company to transact business in Ohio is not well taken, and that such temporary restraining order should not be granted.

8. That by virtue of the Court's finding set forth above, it is not necessary for the Court to respond to the request of the defendants, Ken Bailey, et al., for a finding that for purposes of the application of Chapter 3955, Ohio Revised Code, the date of actual insolvency is irrelevant.

9. That it is not appropriate at this time for the Court to make any determination of whether Buckeye Union Insurance Company is estopped to deny the application of Chapter 3955, Ohio Revised Code, to the liquidation proceedings of Ohio Valley Insurance Company.

That it is not appropriate for the Court to make any order respecting the obligations of the Ohio Insurance Guaranty Association, such obligations of such defendant being set forth in Chapter 3955, Ohio Revised Code, which statute the Court has found by paragraph #2 hereof to be constitutional and to apply to the present liquidation proceedings of Ohio Valley Insurance Company.

It is, therefore, accordingly, the order, declaration, judgment and decree of this Court upon the Cross Complaint for Declaratory Judgment of the defendant Buckeye Union Insurance Company, the Cross Complaint for Declaratory Judgment of the defendants, Ken Bailey, et al., the request for relief set forth in the answer of the defendant, Ohio Insurance Guaranty Association, and the request for relief set forth in the answer of the plaintiff, Fred B. Smith, Superintendent of Insurance of Ohio, to the Cross Complaint of the defendant Buckeye Union Insurance Company and of the defendants, Ken Bailey, et al., that final judgment be rendered therein as follows:

1. On December 31, 1969, defendant, Ohio Valley Insurance Company was insolvent in the sense that it did not possess sufficient assets with which to discharge its liabilities and in the sense that it did not possess sufficient liquid assets to meet its obligations as they became due; and that Ohio Valley Insurance Company continued to be insolvent in both senses from that date to November 27, 1970, the date of the Judgment Decree of Insolvency previously entered herein.

2. Chapter 3955, Ohio Revised Code, (The Ohio Insurance Guaranty Association Act) is constitutional.

3. Chapter 3955, Ohio Revised Code, applies to the present liquidation proceedings of Ohio Valley Insurance Company despite the fact that Ohio Valley Insurance Company was insolvent in both senses described in paragraph #1 hereof prior to September 4, 1970, the effective date of Chapter 3955, Ohio Revised Code.

4. Ohio Valley Insurance Company became an "insolvent insurer" as that phrase is defined in Section 3955.01 (C), Ohio Revised Code, on November 27, 1970, which date is after the effective date of Chapter 3955, Ohio Revised Code.

5. The Ohio Insurance Guaranty Association is fully liable and obligated to handle, process and pay all of the claims of the Ohio Valley Insurance Company pursuant to Chapter 3955, Ohio Revised Code.

6. Both Motions of the defendant Buckeye Union Insurance Company for temporary restraining orders are hereby overruled.

7. In the event an Appeal Bond from the Judgment should be required, the amount of such bond shall be the sum of Two Hundred and no/hundredths ($200.00) Dollars.

TOM MOODY, Judge

Rule 5, Waived by Order of Court.

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Case No. 241,494

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,

Plaintiff,

v.

OHIO VALLEY INSURANCE COMPANY,

Defendant.

STIPULATION

It is stipulated by and among counsel for plaintiff, Fred B. Smith, Superintendent of Insurance of Ohio and, defendants, Ohio Insurance Guaranty Association, Ken Bailey, et al., and Buckeye Union Insurance Company as follows:

1. Defendant, Buckeye Union Insurance Company is an Ohio corporation duly authorized to engage in the insurance business in the State of Ohio, is a member of Ohio Insurance Guaranty Association organized pursuant to Chapter 3955 of the Ohio Revised Code, and is required to remain a member only if it continues to write any kind of insurance to which the Ohio Insurance Guaranty Association Act applies.

2. Plaintiff, Fred B. Smith, is a duly appointed, qualified and acting Superintendent of Insurance of Ohio, and as such, is Director of the Department of Insurance of Ohio.

3. Defendant, Ohio Valley Insurance Company, is an Ohio corporation organized and existing for the purpose of engaging in property and casualty insurance business.

4. On August 12, 1970, plaintiff instituted a proceeding in the Court of Common Pleas of Franklin County, Ohio, in this cause, pursuant to Chapter 3903, Ohio Re-

vised Code, for an order finding that sufficient cause exists for the rehabilitation or liquidation of defendant, Ohio Valley Insurance Company, and directing the plaintiff to take possession of the property, business and affairs of Ohio Valley Insurance Company for the purpose of rehabilitation or liquidation. In his Complaint, the plaintiff alleged that Ohio Valley Insurance Company was insolvent, that it could not meet its policy obligations and that it was in such condition that its further transaction of business would be hazardous to its policyholders, contract holders, creditors and the public.

5. On September 10, 1970, pursuant to Section 3903.06, Ohio Revised Code, this Court found that sufficient cause existed for the rehabilitation or liquidation of Ohio Valley Insurance Company and directed plaintiff to take possession of the property, business and affairs of Ohio Valley Insurance Company and to rehabilitate or liquidate the same. Plaintiff, pursuant to Section 3903.07, Ohio Revised Code, thereby became vested by operation of law with the title to all property of Ohio Valley Insurance Company and became authorized to deal with the property and business of Ohio Valley Insurance Company in his name as Superintendent.

6. On September 18, 1970, pursuant to Section 3903.09, Ohio Revised Code, this Court directed plaintiff to rehabilitate Ohio Valley Insurance Company, to proceed immediately to conduct its business and to take such steps and actions as were expedient toward removal of the causes and conditions which made these proceedings necessary and toward keeping Ohio Valley Insurance Company in such condition that opportunities for rehabilitation remained optimal.

7. On November 13, 1970, this Court after further hearing in this cause to review various plans for re-

habilitation previously submitted to this Court and plaintiff for his consideration, found pursuant to Section 3903.09, Ohio Revised Code, that further efforts to rehabilitate Ohio Valley Insurance Company would be futile and entered an order, pursuant to Section 3903.11, Ohio Revised Code, directing plaintiff to proceed immediately to liquidate the property, business and affairs of Ohio Valley Insurance Company, reserving for future determination the date as of which the rights and liabilities of Ohio Valley Insurance Company and certain classes of persons interested in its assets should be fixed.

8. That on November 27, 1970, after further hearing in this cause, this Court decreed, pursuant to Section 3903.21, Ohio Revised Code, Ohio Valley Insurance Company, to be insolvent as of November 27, 1970, and fixed December 27, 1970, as the date for the determination of the rights of all persons under Section 3903.13, Ohio Revised Code. The Court specifically declined to rule on the Motion of plaintiff that he determine whether or not Ohio Valley Insurance Company became an "insolvent insurer" within the meaning of Section 3955.01 (C), Ohio Revised Code, after the effective date of the Ohio Insurance Guaranty Association Act.

9. On November 27, 1970, pursuant to Section 3955.10 (A) (1), Ohio Revised Code, plaintiff notified defendant, Ohio Insurance Guaranty Association, of the existence of Ohio Valley Insurance Company as an insolvent insurer.

10. The annual report of the Ohio Valley Insurance Company of its financial condition as of December 31, 1969, filed with the Superintendent of Insurance of Ohio in March, 1970, discloses the following as to the financial condition of this company as of December 31, 1969:

"Admitted assets $2,221,070.81

Total liabilities	3,025,968.49
Surplus as regards policyholders	804,897.68"

11. Superintendent of Insurance of Ohio estimated the financial condition of Ohio Valley Insurance Company as of August 31, 1970, to be the following:

"Total assets	$2,610,729.60
Total liabilities	4,274,073.40
Surplus as regards policyholders	1,663,343.80"

12. Superintendent of Insurance of Ohio estimated the financial condition of Ohio Valley Insurance Company as of October 31, 1970, to be the following:

"Total assets	$2,614,593.71
Total liabilities	4,086,342.56
Surplus as regards policyholders	1,471,748.85"

13. John P. Dye, if called as a witness, will testify that he is an insurance examiner for the department of Insurance of the State of Ohio; that as part of his duties, he was an examiner of Ohio Valley Insurance Company and is presently serving as Chief Deputy Conservator of Ohio Valley Insurance Company; and that during the first seven months of 1970 the cash flow of Ohio Valley Insurance Company deteriorated to the point that numerous settled claims could not be paid by Ohio Valley Insurance Company.

14. Defendant, Ohio Insurance Guaranty Association, unless restrained by this Court, will incur expense in connection with claims against Ohio Valley Insurance Company, will proceed to settle and to pay covered claims and for this purpose, will levy assessments against its members pursuant to Chapter 3955, Ohio Revised Code.

15. Substantially all of the insurance policies written by Ohio Valley Insurance Company were automobile policies. The direct premiums written in the State of Ohio for automobile policies by Buckeye Union Insur-

ance Company for the calendar year 1969 were $48,-929,843 and the direct premiums written in the State of Ohio on automobile policies by all insurers authorized to write automobile policies in the State of Ohio for the calendar year 1969 were $639,472,302.

WILLIAM M. LANE
William M. Lane, Attorney for Fred B. Smith, Superintendent of Insurance of the State of Ohio

WILLIAM L. SCHMIDT
William L. Schmidt, Attorney for Buckeye Union Insurance Company

ARTHUR I. VORYS
Arthur I. Vorys, Attorney for Ohio Insurance Guaranty Association

THOMAS H. DECHANT
Thomas H. DeChant, Attorney for Ken Bailey, et al.

APPENDIX B

Ohio Constitutional and Statutory Provisions

1. Section 28, Article II, Ohio Constitution

§28 Retroactive laws.

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

2. Chapter 3955, Ohio Revised Code

CHAPTER 3955: OHIO INSURANCE GUARANTY ASSOCIATION

Section
3955.01 [Definitions.]
3955.02 [Title.]
3955.03 [Purposes.]
3955.04 [Construction of statute.]
3955.05 [Exclusions.]
3955.06 [Creation of nonprofit association.]
3955.07 [Board of directors.]
3955.08 [Powers and duties.]
3955.09 [Plan of operation.]
3955.10 [Powers and duties of superintendent.]
3955.11 [Surplus fund.]
3955.12 [Subrogation; claims against insolvent insurers; reports.]
3955.13 [Exhaustion of rights.]
3955.14 [Duties of board.]
3955.15 [Examination by superintendent; financial reports.]
3955.16 [Exemption from taxation.]
3955.17 [Unreasonableness of rates.]
3955.18 [Liability.]
3955.19 [Continuation of cause of action.]
3955.20 [Unfair trade practice.]

§3955.01 [Definitions.]

As used in sections 3955.01 to 3955.20, inclusive, of the Revised Code:

(A) "Account" means either of the two accounts created by division (B) of section 3955.06 of the Revised Code.

(B) "Covered claim" means an unpaid claim, includ-

ing one for unearned premiums, which arises out of and is within the coverage of an insurance policy to which sections 3955.01 to 3955.20, inclusive, of the Revised Code apply, when issued by an insurer which becomes an insolvent insurer on or after the effective date of this act and the claimant or insured is a resident of this state at the time of the insured event or the property from which the claim arises is permanently located in this state.

"Covered claim" does not include any amount due any reinsurer, insurer, insurance pool, or underwriting association.

(C) "Insolvent insurer" means an insurer authorized to transact insurance in this state either at the time the policy was issued or when the insured event occurred, decreed by a court of competent jurisdiction of the state of such insurer's domicile to be insolvent, and ordered by or pursuant to the authority of such court to be liquidated.

(D) "Member insurer" means any person who writes any kind of insurance to which this act applies, as prescribed in section 3955.05 of the Revised Code, including the exchange of reciprocal or interinsurance contracts, and is licensed to transact any insurance in this state.

(E) "Net direct written premiums" means direct gross premiums written in this state on insurance policies to which sections 3955.01 to 3955.20, inclusive, of the Revised Code apply, less return premiums thereon and dividends paid or credited to policyholders on such direct business, but does not include premiums on contracts between insurers or reinsurers.

(F) "Special surplus insolvency fund" means the fund established by a member insurer in compliance with section 3955.11 of the Revised Code.

§3955.02 [Title.]

Sections 3955.01 to 3955.20, inclusive, of the Revised Code may be cited as the Ohio insurance guaranty association act.

§3955.03 [Purposes.]

The purposes of sections 3955.01 to 3955.20, inclusive, of the Revised Code are to provide a mechanism for the payment of covered claims under certain insurance policies; avoid excessive delay in payment and financial loss to claimants or policyholders because of the insolvency of an insurer, assist in the detection and prevention of insurer insolvencies, and provide an association to assess the cost of such protection among insurers.

§3955.04 [Construction of statute.]

Sections 3955.01 to 3955.20, inclusive, of the Revised Code shall be liberally construed to effect the purpose stated under section 3955.03 of the Revised Code, which shall constitute an aid and guide to interpretation.

§3955.05 [Exclusions.]

Sections 3955.01 to 3955.20, inclusive of the Revised Code apply to all kinds of direct insurance, except:

(A) Title insurance;

(B) Surety bonds;

(C) Credit guaranty insurance;

(D) Mortgage guaranty insurance;

(E) Ocean marine insurance;

(F) Insurance underwritten or reinsured by any agency of this state or the United States;

(G) Contracts of any nonprofit corporation by which health services are to be provided to its subscribers;

(H) Life insurance;

(I) Fraternal benefit insurance;

(J) Mutual protective insurance of persons or property;

(K) Sickness and accident insurance pursuant to Chapter 2923. of the Revised Code.

§3955.06 [Creation of nonprofit association.]

(A) There is hereby created a nonprofit unincorporated association to be known as the Ohio insurance guaranty association. All member insurers, as defined in division (D) of section 3955.01 of the Revised Code, shall be and remain members of the association as a condition of their authority to transact insurance in this state. The association shall perform its functions under a plan of operation established and approved under section 3955.09 of the Revised Code and shall exercise its powers through a board of directors established under section 3955.07 of the Revised Code.

(B) For purposes of administration and assessment, the association shall be divided into two accounts:

(1) The automobile insurance account;

(2) The account for all other insurance to which sections 3955.01 to 3955.20, inclusive, of the Revised Code apply.

§3955.07 [Board of directors.]

(A) The board of directors of the Ohio insurance guaranty association shall consist of not less than five nor more than nine persons serving terms as established in the plan of operation. The members of the board shall be selected by member insurers, subject to the approval of the superintendent. Vacancies on the board shall be filled for the remaining period of the term in the same manner as initial appointments. If no members are selected within sixty days after the effective date of this

act, the superintendent of insurance may appoint the initial members of the board of directors. A majority of the members shall be representatives of domestic insurers.

(B) In approving selections to the board, the superintendent shall consider among other things whether all member insurers are fairly represented.

(C) Members of the board may be reimbursed from the assets of the association for expenses incurred by them as members of the board of directors.

§3955.08 [Powers and duties.]

(A) The Ohio insurance guaranty association shall:

(1) Be obligated to the extent of the covered claims existing prior to the determination that an insolvent insurer exists and arising within thirty days after such determination, or before the policy expiration date if less than thirty days after the determination, or before the insured replaces the policy or on request effects cancellation, if he does so within thirty days after the determination. In no event shall the association be obligated to a policyholder or claimant in an amount in excess of the face amount of the policy from which the claim arises;

(2) Be deemed the insurer to the event of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent;

(3) Allocate claims paid and expenses incurred among the accounts separately; and assess member insurers separately for each account amounts necessary to pay the obligations of the association under division (A) (1) of this section subsequent to an insolvency, the ex-

penses of handling covered claims subsequent to insolvency, the cost of examinations under section 3955.14 of the Revised Code, and other expenses authorized by sections 3955.01 to 3955.20, inclusive, of the Revised Code. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year on the kinds of insurance in the account bears to the net direct written premiums of all member insurers for the preceding calendar year on such kinds of insurance.

Each member insurer shall be notified of the assessment not later than thirty days before it is due. Each member insurer may be assessed in any year on any account an amount not greater than one and one-half per cent of its net direct written premiums for the preceding calendar year on the kinds of insurance in that account. If the maximum assessment, together with the other assets of the association in any account, does not provide in any one year in any account an amount sufficient to make all necessary payments from that account, the funds available shall be prorated and the unpaid portion shall be paid as soon as funds become available.

The association may exempt or defer, in whole or in part, the assessment of any member insurer, if it would cause the insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which such insurer is authorized to transact insurance. Each member insurer may set off against any assessment authorized payments made on covered claims and expenses incurred in the payment of such claims if they are chargeable to the account for which the assessment is made. [;]

(4) Investigate claims brought against the association and adjust, compromise, settle, or pay covered claims to the extent of the association's obligation and deny all other claims;

(5) Notify such persons as the superintendent directs under section 3955.10 of the Revised Code;

(6) Handle claims through its employees or through one or more insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the superintendent, but may be declined by a member insurer. [;]

(7) Reimburse each servicing facility for obligations of the association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the association, and pay all other expenses of the association authorized by sections 3955.01 to 3955.20, inclusive, of the Revised Code.

(B) The association may:

(1) Appear in, defend, and appeal any action on a claim brought against the association;

(2) Employ or retain such persons as are necessary to handle claims and perform other duties of the association;

(3) Borrow funds necessary to effect the purposes of sections 3955.01 to 3955.20, inclusive, of the Revised Code, in accord with the plan of operation;

(4) Sue or be sued;

(5) Negotiate and become a party to such contracts as are necessary to carry out the purposes of sections 3955.01 to 3955.20, inclusive, of the Revised Code;

(7) Refund to the member insurers in proportion to the contribution of each member insurer to that account that amount by which the assets of the account exceed

the liabilities, if at the end of any calendar year, the board of directors finds that the assets of the association in any account exceed the liabilities of that account as estimated by the board of directors for the coming year.

§3955.09 [Plan of operation.]

(A) The Ohio insurance guaranty association shall submit to the superintendent of insurance a plan of operation and any amendments thereto necessary or suitable to assure the fair, reasonable, and equitable administration of the association. If the association fails to submit a suitable plan of operation within ninety days after the effective date of this chapter, or if at any time the association fails to submit suitable amendments to the plan, the superintendent shall promulgate a plan of operation or any amendments thereto. The plan of operation and any amendments thereto shall become effective upon adoption by the superintendent pursuant to Chapter 119. of the Revised Code.

(B) All member insurers shall comply with the plan of operation.

(C) The plan of operation shall:

(1) Establish the procedures whereby all the powers and duties of the association shall be performed;

(2) Establish procedures for handling assets of the association;

(3) Establish the amount and method of reimbursing members of the board of directors under section 3955.07 of the Revised Code;

(4) Establish procedures whereby claims may be filed with the association, hearings and appeals thereon may be had, and acceptable forms of proof of claims may be prescribed. Notice of claims to the receiver or liquidator appointed in this state of an insolvent insurer shall

be deemed notice to the association or its agent. A list of such claims shall be periodically submitted to an association or similar organization in another state by any receiver or liquidator appointed in this state. Any notice of claim filed with a receiver or liquidator appointed in another state, if such receiver or liquidator forwards a certified copy thereof to the association within such time as is designated for filing claims with the association, shall be deemed notice to the association. [;]

(5) Establish regular places and times for meetings of the board of directors;

(6) Establish procedures for records to be kept of all financial transactions of the association, its agents, and the board of directors;

(7) Provide that any member insurer aggrieved by any final action or decision of the association may appeal to the superintendent within thirty days after the action or decision;

(8) Establish the procedures whereby selections for the board of directors shall be submitted to the superintendent: [;]

(9) Contain additional provisions necessary or proper for the execution of the powers and duties of the association.

(D) The plan of operation may provide that any or all powers and duties of the association, except those under divisions (A) (3) and (B) (3) of section 3955.08 of the Revised Code, may be delegated to a corporation, association, or other organization which performs or will perform functions similar to those of this association, or its equivalent, in two or more states. Such a corporation, association, or organization shall be reimbursed as a servicing facility and paid for its performance of any other

functions of the association. A delegation under this division shall take effect only with the approval of both the board of directors and the superintendent, and may be made only to a corporation, association, or organization which extends protection not substantially less favorable and effective than those provided by sections 3955.01 to 3955.20, inclusive, of the Revised Code.

§3955.10. [Powers and duties of superintendent.]

(A) The superintendent of insurance shall:

(1) Notify the association of the existence of an insolvent insurer not later than three days after he receives notice thereof;

(2) Upon request of the board of directors, provide the association with a statement of the net direct written premiums of each member insurer related to either account.

(B) The superintendent may:

(1) Require that the association notify the insureds of an insolvent insurer and any other interested parties of the determination of insolvency and of their rights under sections 3955.01 to 3955.20, inclusive, of the Revised Code. Such notification shall be by mail at their last known address, but if sufficient information for notification by mail is not available, notice by publication in a newspaper of general circulation in an area reasonably selected to assure that interested parties will become acquainted with the facts shall be sufficient. [;]

(2) Suspend or revoke, after notice and hearing under Chapter 119. of the Revised Code, the certificate of authority to transact insurance in this state of any member insurer which fails to pay an assessment when due or to comply with the plan of operation. The superinten-

dent may, in lieu of such suspension or revocation, levy a penalty on any member insurer which fails to pay an assessment when due. Such penalty shall not exceed five per cent of the unpaid assessment, per month, except that no penalty shall be less than one hundred dollars per month;

(3) Revoke the designation of any servicing facility when he finds claims are being handled unsatisfactorily.

(C) Any final action or order of the superintendent under sections 3955.01 to 3955.20, inclusive, of the Revised Code, is subject to judicial review under Chapter 119. of the Revised Code.

§3955.11 [Surplus fund.]

Each member insurer shall maintain a special surplus insolvency fund to meet the obligations imposed by sections 3955.01 to 3955.20, inclusive, of the Revised Code. Not later than the last day of February in each year the member insurer shall increase such fund by not less than one-half of one per cent of its net direct written premiums for the preceding calendar year, unless such fund, as of the last day of such preceding calendar year, is not less than one and one-half per cent of such net direct written premiums or unless a lesser increase in such fund will cause it to equal such amount, in which case such lesser increase may be made. Such fund shall not be decreased for any reason other than payment of an assessment made in compliance with division (A) (3) of section 3955.08 of the Revised Code or a decrease in the annual net direct written premiums of the member insurer. The amount in the fund shall be included by the member insurer as a separate item under special surplus funds in its annual statement.

§3955.12 [Subrogation; claims against insolvent insurers; reports.]

(A) The Ohio insurance guaranty association shall be subrogated to the rights of any person recovering under sections 3955.01 to 3955.20, inclusive, of the Revised Code to the extent of his recovery from the association. Every insured or claimant seeking the protection of sections 3955.01 to 3955.20, inclusive, of the Revised Code, shall cooperate with the association to the same extent as such person would have been required to cooperate with the insolvent insurer. The association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out.

(B) The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by settlements of covered claims by the association or a similar organization in another state. The court having jurisdiction shall grant such claim priority equal to that which the claimant would have been entitled in the absence of sections 3955.01 to 3955.20, inclusive, of the Revised Code against the assets of the insolvent insurer. The expenses of the association or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses.

(C) The association shall periodically file with the receiver or liquidator of an insolvent insurer reports of the covered claims paid by the association and estimates of anticipated claims on the association, which shall preserve the right to the association against the assets of the insolvent insurer.

§3955.13 [Exhaustion of rights.]

(A) Any person having a covered claim upon which recovery is also presently possible under an insurance

policy written by another insurer shall be required first to exhaust his rights under such other policy. Any amount payable on a covered claim under section 3955.01 to 3955.20, inclusive, of the Revised Code shall be reduced by the amount of such recovery.

(B) Any person having a claim which may be recovered against more than one insurance guaranty association or its equivalent shall first seek recovery from the association of the place of residence of the insured, except that a first party claim for damage to property with a permanent location shall first be presented to the association of the state of the location of the property. Any recovery under sections 3955.01 to 3955.20, inclusive, of the Revised Code shall be reduced by the amount of recovery from another insurance guaranty association or its equivalent.

§3955.14 [Duties of board.]

To aid in the detection and prevention of insurer insolvencies:

(A) It shall be the duty of the board of directors of the Ohio insurance guaranty association to notify the superintendent of any information indicating any member insurer may be insolvent or is found to be in such condition that its further transaction of business would be hazardous to its policyholders, contract holders, creditors, or the public. Such notice and information shall be kept confidential by the board and the superintendent.

(B) The board of directors, at a meeting with two-thirds of its members present and voting, may request that the superintendent of insurance order an examination of any member insurer which the board in good faith believes to be in such condition that its further

transaction of business would be hazardous to its policyholders, contract holders, creditors, or the public. Within thirty days of the receipt of such request, the superintendent shall begin such examination. The examination may be conducted as a national association of insurance commissioners examination or by such persons as the superintendent designates. The cost of such examination shall be paid by the association and the examination report shall be treated as are other such reports. In no event shall such examination report be released to the board of directors prior to its release to the public, but this shall not preclude the superintendent from complying with division (C) of this section. The superintendent shall notify the board of directors when the examination is completed. The request for an examination shall be kept on file by the superintendent, but it shall not be open to public inspection prior to the release of the examination report to the public.

(C) The superintendent shall report to the board of directors when he has reasonable cause to believe that any member insurer examined or being examined at the request of the board of directors may be insolvent or in such condition that its further transaction of business would be hazardous to its policyholders, contract holders, creditors, or the public.

(D) The board of directors may make reports and recommendations to the superintendent upon any matters relating to the solvency, liquidation, rehabilitation, or conservation of any member insurer. Such reports and recommendations shall not be considered public records.

(E) The board of directors may make recommendations to the superintendent for the detection and prevention of insurer insolvencies.

(F) The board of directors shall, at the conclusion of

any insurer insolvency in which the association was obligated to pay covered claims, prepare a report on the history and causes of such insolvency, based on the information available to the association, and submit such report to the superintendent.

§3955.15 [Examination by superintendent; financial reports.]

The Ohio insurance guaranty association is subject to examination and regulation by the superintendent of insurance. The association shall submit in a form approved by the superintendent, not later than the thirtieth day of March of each year, a financial report for the preceding calendar year.

§3955.16 [Exemption from taxation.]

The Ohio insurance guaranty association is exempt from payment of all fees and taxes levied by this state or any of its subdivisions.

§3955.17 [Unreasonableness of rates.]

A rate shall not be found excessive under section 3935.03 or 3937.02 of the Revised Code solely because it contains a factor designed to maintain the fund required under section 3955.11 of the Revised Code and to recover any amounts paid to the Ohio insurance guaranty association by a member insurer as an assessment under division (A) (3) of section 3955.08 of the Revised Code from sources other than such fund.

§3955.18 [Liability.]

There shall be no liability on the part of and no cause of action of any nature shall arise against any member insurer, the Ohio insurance guaranty association or its agents or employees, the board of directors, or the superintendent of insurance or his representatives for any

action taken by them in the performance of their powers and duties under sections 3955.01 to 3955.20, inclusive, of the Revised Code.

§3955.19 [Continuation of cause of action.]

All proceedings in which an insolvent insurer is a party in any court in this state shall be continued for sixty days from the date the insolvency is decreed by a court of competent jurisdiction, to permit a proper defense by the Ohio insurance guaranty association of all pending causes of action.

§3955.20 [Unfair trade practice.]

It is an unfair trade practice for any insurer or agent to make use in this state in any manner of the protection given policyholders by sections 3955.01 to 3955.20, inclusive, of the Revised Code, as a reason for purchasing insurance from such insurer or agent.

§3903.23 Payment of claims and distribution of assets. (GC §628-22)

Any time after the last day fixed for the filing of proofs of claim in the liquidation of a domestic company, the court of common pleas may, upon the application of the superintendent of insurance, authorize him to declare out of the funds remaining in his hands after the payment of expenses, one or more dividends upon all claims allowed. Such order shall specify what claims are entitled to priority of payment and shall direct the manner in which dividends shall be paid.

When there has been no adjudication of insolvency, the superintendent shall pay all allowed claims in full and shall distribute the balance of the assets remaining in his hands after reserving sufficient assets for all administration costs and fees, in accordance with the di-

rection of the court. The superintendent shall not be chargeable for any assets distributed to a claimant who has failed to file a proper proof of claim before such distribution has been made.

Subsequent to an adjudication of insolvency pursuant to section 3903.21 of the Revised Code, when a surplus is found to exist after the payment in full of all allowed claims which have been filed prior to the last date fixed for the filing thereof, and after the setting aside of a reserve for all costs and expenses of the proceeding, the court shall set a new date for the filing of claims. After the expiration of said new date, the solvency of such company shall be re-examined, and, if such company is found to be solvent on the basis of all claims then filed and allowed, any surplus shall be distributed in accordance with the direction of the court.

Dividends remaining unclaimed or unpaid in the hands of the superintendent for six months after the final order of distribution may be deposited by him in the state depository trust fund to the credit of the superintendent, in trust for the persons entitled thereto, but no person shall be entitled to any interest upon such deposit. Any such funds remaining and unclaimed to the credit of the superintendent in trust after five years shall be paid by him to the treasurer of state to be credited to the funds received from insurance revenues.

Appendix C. Statutes and Proceedings Outside Ohio

1. Guaranty Acts patterned after model act of National Association of Insurance Commissioners:

State	*Statute*	*Eff. Date*
Alaska	Alaska Stat. Sections 21.80.010,-.090 (1970)	8/6/70
Arizona	*Ariz. Rev. Stat. Ann.* Sections 20-661,-674 (West Supp. 1970)	8/11/70
Colorado	*Colo. Rev. Stats.* 1968 Ch. 72, Art. 34, (1971 Session Laws, Ch. 205, p. 756)	7/1/70
Connecticut	*Public Act No. 466* January Session 1971	Approved 6/12/71
Delaware	*Del. Code Ann.* tit 18, Sections 4201-4318 (Spec. Insurance Pamphlet 1968)	7/1/70
Florida	*Fla. Stat. Ann.* Sections 631.50,-67 West. Supp. (1971)	10/1/70
Georgia	*Ga. Code Ann.* Sections 56-3401a,-3417a (1971)	7/1/70
Hawaii	H. B. 57 (1971) not yet reported	
Idaho	*Idaho Code Sections* 41-3601,-3620 (Supp. 1970)	7/1/70
Illinois	*Smith-Hurd Ill. Ann. Stats.*, Ch. 73 §1065.82 et seq., (Ill. Public Act 77-305)	7/21/71
Indiana	*Ind. Code* 1971, 27-6-8, Ch. 8 (Ind. Acts 1971 6, 1, p. 1787)	1/1/72
Iowa	*Iowa Code Ann.* Sections 515B.1,-.16 (Supp. 1971)	7/1/70
Kansas	1970 New Laws 357	upon publication
Kentucky	Ky. Admin. Reg. I-3.01	8/6/70
Louisiana	*La. Rev. Stat.* Sections 22.1375,-1394 (West. Supp. 1971)	9/1/70
Maine	*Me. Rev. Stat. Ann.* tit 24-A, Sections 4451-4467 (West Supp. 1971)	5/9/70
Maryland	*Ann. Code of Md.* Art. 48A, §504-519 (1971 Cum. Supp.)	7/1/71
Massachusetts	*Mass. Gen. Laws* ch. 175-D, Sections 1-16 (Supp. 1971)	1/1/71
Minnesota	1971 Laws of Minnesota ch. 145	7/1/71
Mississippi	*Miss. Code Ann.* Sections 5814-.51,-69 (Temp. Supp. 1970)	4/6/70
Missouri	1971 Regular Session Act 52	90 days after adjournment
Montana	S.B. 123 (1971) not yet reported	
Nebraska	*Neb. Rev. Stats.*, Art 44	5/26/71
Nevada	*Nev. Ins. Code* Sections 815-871	

State	Statute	Eff. Date
New Hampshire	*N.H. Rev. Stat. Ann.* 404-B:1, to B:18 (Supp 1970)	5/4/70
North Carolina	*Gen. Stats. of N.C.*, Ch. 58, §58, 155.41 et seq. (1971 Advance Leg. Serv. No. 9, Ch. 58, Insurance)	
North Dakota	H.B. 1289 (1971) not yet reported	
Oregon	S.B. 193 (1971) not yet reported	
Pennsylvania	*Pa. Stat. Ann.* tit 40 sections 1701.101,-.605 (1971)	11/25/70
Rhode Island	*R. I. Gen Laws Ann.* Sections 27-34-1 to 27-34-17 (Supp. 1970)	5/7/70
South Carolina	H.B. 1146 (1971) not yet reported	
South Dakota	*S.D. Compiled Laws Ann.* Sections 58-29A, -53 (Supp. 1971)	7/1/70
Tennessee	H.B. 208 (1971) not yet reported	
Texas	*Texas Ins. Code*, Art 21.28 C (Vernon's Tex. Sess. L. Serv. 1971, No. 4, p. 1362)	5/27/71 5/11/71
Utah	1971 Laws of Utah 237	
Vermont	*Vt. Stat. Ann.* tit 8 sections 3611-3625 (1970)	4/9/70
Virginia	*Va. Code Ann.* Sections 38-1-756.1,-774 (1970)	6/26/70
Washington	1971 Laws of Washington Ch. 265	4/1/71
West Virginia	*W. Va. Code Ann.* Sections 33-26-1, -19 (Supp. 1971)	5/12/70
Wyoming	*Wyo. Stat. Sections* 26.1 - 674, -689 (Supp. 1971)	2/27/71

The following states have statutes with language similar to the Model Act but predating it.

California	*Calif. Ins. Code* Sections 1063. to 1063.12 (West. Supp. 1971)	9/2/69
Michigan	*Mich. Comp. Laws Ann.* Sections 500.7901,-.7949 (Supp. 1971)	8/11/69

The following states have dissimilar Guaranty Fund legislation predating the Model Bill:

New Jersey	*N.J. Stat. Ann.* Sections 39:6-92 to -104 (1961).	1952
New York	*N.Y. Ins. Law* Section 224 (McKinney 1966)	4/24/61
Wisconsin	*Wisc. Stat. Ann.* Sections 646-01,-.31 (West. Special Pamphlet 1970)	8/22/69

2. Present insurance company insolvencies which can be affected by decision in this case.[5]

Company	Domiciliary State	Other States in which Licensed	Date of Action by Domiciliary State	Effective Date of Guaranty Act	Estimated Losses to Claimants
First American Insurance Co.	Florida	None	2/23/71	10/1/71	$2,000,000
Fidelity General Ins. Co.	Illinois[3]		12/4/70	7/21/71	Unknown at this time
		Arizona[1]		8/11/70	
		Oregon[3]		Not yet reported	
		Nevada			
		Puerto Rico		Does not have NAIC Model Act	
		Washington[3]		4/1/71	
		Utah[3]		5/11/71	
Homeowners Ins. Co.	Illinois[3]		4/18/71	7/21/71	Unknown at this time
		Florida[1]		10/1/70	
		Georgia[1]		7/1/70	
		Idaho		7/1/70	
		Indiana[3]		1/1/72	
		Kansas			
		Louisiana[3]		9/1/70	
		Minnesota[3]		7/1/71	
		Mississippi[1]		4/6/70	
		Missouri[3]		(1971) 90 days after adjournment	
		Montana			
		New Jersey		Does not have NAIC Model Act	
		Oklahoma		Does not have NAIC Model Act	
		Oregon			
		Tennessee			

		Washington[1]		4/1/71	
		Wyoming[1]		2/27/71	
Wabash Fire & Casualty Co.	Indiana	Information is not available to appellant at time of preparing petition for certiorari. The company is licensed to transact insurance in 13 states.	8/25/70	1/1/72	$1,000,000
Maine Ins. Co.	Maine[2]		1/14/71	5/9/70	Unknown at this time
		Arizona[1]		8/11/70	
		**Florida[2]		10/1/70	
		**Ohio[2]		9/4/70	
United Bonding Company	Indiana[3]	Licensed in 48 states. In at least one of them, Louisiana, the position of the Supreme Court of Ohio has been asserted in connection with the United Bonding Company insolvency.	2/18/71[4]	1/1/72	$1,500,000
				Louisiana[1] guaranty act was effective 9/1/70	
Liberty Universal Insurance Company	Texas[3]	Licensed in 6 states besides Texas, including Louisiana and Michigan. Depending on whether the Louisiana courts conclude that the company was "declared insolvent" after the effective date of the Louisiana act within the meaning of that	11/20/70	5/25/71	$4,000,000
				Louisiana[2] guaranty act was effective 9/1/70	
				Michigan's[1] guaranty act was	

Company	Domiciliary State	Other States in which Licensed	Date of Action by Domiciliary State	Effective Date of Guaranty Act	Estimated Losses to Claimants
		act, the questions herein presented for review could arise.		effective 8/11/69	
Citizens Casualty Company of New York.		Licensed in Louisiana, among others—see comment immediately above.		Louisiana's guaranty act was effective 9/1/70	
Key Insurance Exchange	California[4]	None	11/10/69	9/2/69	$100,000

Notes:

1. States where the question herein presented for review could be raised because the effective date of the state guaranty act precedes initiation of insolvency proceedings or other state action by a short time.
2. States and cases in which the question herein presented for review has been raised, either in judicial proceedings or prior to institution of judicial proceedings.
3. States in which NAIC Model Act would probably not apply because domiciliary insolvency proceedings or other state action preceded effective date of guaranty act.
4. California and Michigan have guaranty acts which predate the NAIC Model Act. However, both acts have present tense language in their definitions of "covered claim" which is susceptible of the interpretation made by the Supreme Court of Ohio to exclude claims which arose prior to the effective date of the Ohio Act. See Section 7063.1, California Insurance Code, Mich. Stats. Ann. §24.17925.
5. Losses to all claimants of the company.
6. Collated from information furnished by the National Association of Insurance Commissioners and the Associate Counsel of the Maine Insurance Company.

APPENDIX D

Letter from Russell E. Van Hooser, Vice President and Chairman of the Executive Committee of The National Association of Insurance Commissioners

EXECUTIVE SECRETARY'S OFFICE
633 W. WISCONSIN AVENUE SUITE 1815
MILWAUKEE, WISCONSIN 53203 414-271-4464

November 18, 1971

The Hon. Kenneth E. DeShetler
Director of Insurance
State of Ohio
115 East Rich Street
Columbus, Ohio 43215

Re: Ohio Valley Insurance Company Case

Dear Director:

As you recall, the National Association of Insurance Commissioners (NAIC) formally filed a motion for leave to file an amicus curiae brief in support of your motion for reconsideration of the decision of the Supreme Court of Ohio in the above case, that the Supreme Court of Ohio granted this motion and that outside counsel were hired at considerable expense to file and did file the amicus brief.

The NAIC would like to be able to continue its support of your position on an amicus basis in the Supreme Court of the United States. However, because of limitations on our financial resources (the NAIC Central Office is supported by public funds raised by assessments levied against member states), we cannot afford to again hire

outside counsel for this purpose. We do not want our inability to formally participate to be construed as a lack of support. On the contrary, the Executive Committee of the NAIC at its meeting in Detroit on September 21, 1971, by resolution, expressed the collective support of its members and of the association for the efforts of the Director of Insurance of Ohio in seeking United States Supreme Court review of the Ohio decision which denied claimants whose claims arose prior to September 4, 1970, participation in the Ohio Insurance Guaranty Fund. The members of the Executive Committee were of the opinion (1) that the Ohio decision interpreting language which appears in the model insurance guaranty act, drafted and sponsored by the NAIC, frustrates the purpose of the model act by inflicting unnecessary hardships on many of the people the act was designed to help, (2) contrary to the intent and provisions of the model act (the Supreme Court of Ohio mistakenly construed language intended to describe the origin or genesis of the insurance claims as a time limitation), and (3) that the Ohio decision could have an unwarranted precedent effect in other states.

On behalf of the Executive Committee, I am empowered to authorize you to represent our support of your position to the Supreme Court of the United States.

Very truly yours,

RUSSELL E. VAN HOOSER
Chairman, Executive Committee.

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971
No. 71-782

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Petitioner,

v.

OHIO VALLEY INSURANCE COMPANY,
Defendant,

(BUCKEYE UNION INSURANCE COMPANY,
Intervening Defendant-Respondent),

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervening Defendant-Respondent),

(KEN BAILEY, ET AL.,
Intervening Defendant-Petitioner).

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT, BUCKEYE UNION INSURANCE COMPANY, IN OPPOSITION

WILLIAM L. SCHMIDT
42 East Gay Street
Columbus, Ohio 43215
Attorney for respondent,
Buckeye Union Insurance Company

(Continued Inside Front Cover)

Kenwel Printers & Publishers, Inc., Columbus, Ohio 43214

CRABBE, BROWN, JONES, POTTS AND SCHMIDT
J. ROTH CRABBE
42 East Gay Street
Columbus, Ohio 43215
Of Counsel

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinions below	1
Jurisdictional grounds	1
(i) Date of judgment sought to be reviewed	1
(ii) Statutory provisions conferring jurisdiction on the Supreme Court of the United States	2
Questions presented for review	2
Constitutional provisions and statutes involved	3
Statement of the case	4
Argument	5
(i) The issue presented is of transitory interest	5
(ii) The federal constitutional issue was not timely raised	5
(iii) The rationale of the decision sought to have reviewed rests entirely upon state law	7
(iv) The decision of the Supreme Court of Ohio is correctly circumspect in its scope	8
Summary	12
Affidavit of service	14

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes

	Page
Amendment XIV, Constitution of the United States	3, 10, 11
Article II, Section 28, Constitution of the State of Ohio	3, 8, 10
Article VI, Section 2, Constitution of the United States	10
Chapter 3955, Ohio Revised Code	4, 6, 7, 9, 10, 12
Section 3955.01(D), Ohio Revised Code	8
28 U.S.C., Section 1257	2, 7
28 U.S.C., Section 2101(C)	2

Rules of Court

	Page
Rule IX, Supreme Court of Ohio Rules of Practice	2
Rule 23.3, Rules of Practice of the Supreme Court of the United States	4

Cases Cited and Quoted

	Page
American Surety Company v. Baldwin, (1932) 287 U.S. 156, 77 L. ed. 231, 53 Sup. Ct. 98	5
Anonymous v. Baker, (1959) 360 U.S. 287, 3 L. ed. 2d 1234, 79 Sup. Ct. 1157	7
Burton v. Wilmington Parking Authority, (1961) 365 U.S. 715, 6 L. ed. 2d 45, 81 Sup. Ct. 856	7

Live Oak Water Users Assoc. v. Rd. Commission, (1926) 269 U.S. 354, 70 L. ed. 305, 46 Sup. Ct. 149 5

Mayflower Farms v. Ten Eyck, (1935) 297 U.S. 266, 80 L. ed. 675 11

McGarrity v. Delaware River Bridge Commission, (1934) 292 U.S. 19, 78 L. ed. 1095, 54 Sup. Ct. 771 (rehearing denied, 292 U.S. 607, 78 L. ed. 1468, 54 Sup. Ct. 771) 6

Sperry & Hutchins Co. v. Rhodes, (1911) 220 U.S. 502, 55 L. ed. 561, 31 Sup. Ct. 490 11

State ex rel., Crotty v. Zangerle, (1938) 133 O.S. 532, 11 O.O. 226, 14 N.E. 2d 932 9

State ex rel., Holdridge v. Industrial Commission, (1967) 11 O.S. 2d 175, 40 O.O. 2d 162, 228 N.E. 2d 621 9

Williams v. Walsh, (1912) 222 U.S. 415, 56 L. ed. 253, 32 Sup. Ct. 137 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971
No. 71-782

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Petitioner,

v.

OHIO VALLEY INSURANCE COMPANY,
Defendant,

(BUCKEYE UNION INSURANCE COMPANY,
Intervening Defendant-Respondent),

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervening Defendant-Respondent),

(KEN BAILEY, ET AL.,
Intervening Defendant-Petitioner).

BRIEF OF RESPONDENT, BUCKEYE UNION INSURANCE COMPANY, IN OPPOSITION

(a) **Opinions below.**

The opinions and decisions below are as stated by the petitioner in his petition and as contained in "Appendix A, Opinions Below and Orders of Courts Below", pages 21 through 68 of petitioner's brief. Pages 69 through 73 captioned "Stipulation" and forming part of petitioner's Appendix A form no part of the decisions or opinions below.

(b) **Jurisdictional Grounds:**

(i) **Date of judgment sought to be reviewed.**

Judgment of the Supreme Court of Ohio was rendered

July 21, 1971. Thereafter a motion for rehearing and reconsideration was filed on July 31, 1971. This respondent, thereafter, filed a motion to dismiss the petitioner's motion on August 3, 1971, due to untimeliness under Rule IX, Supreme Court of Ohio, Rules of Practice.[1] Subsequently, the petitioner's motion was denied without opinion.

(ii) Statutory provisions conferring jurisdiction on the Supreme Court of the United States.

If the provisions of 28 U.S.C. Section 2101 (C) have been met by petitioners then jurisdiction may be conferred by 28 U.S.C. Section 1257.

(c) Questions Presented for Review.

Questions numbered one through four under petitioner's caption of "Questions presented for review" (pages 2-4), insofar as they present federal constitutional questions were never presented to any court of the State of Ohio prior to a motion for rehearing and reconsideration filed in the Supreme Court of Ohio which motion was denied

---

1. Rule IX, Supreme Court of Ohio, Rules of Practice, provided as follows:

Section 1. Motion for Rehearing.

A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds specified for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra.

Section 2. Issuance of Mandate.

Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a mandate in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the mandate shall issue at the same time as the decision on the motion for rehearing. No mandate shall issue on denial of appeal or denial of leave to appeal.

without opinion. With regard to the fifth question presented by petitioner, this respondent believes that a proper state constitutional issue was made but the Supreme Court of Ohio did not deem it necessary except in a cursory manner to approach this problem to arrive at its decision.

(d) **Constitutional Provisions and Statutes Involved.**

The respondent accepts that the listing of constitutional provisions and statutes enumerated by the petitioner on page four of its brief are the fundamentally relevant legal provisions involved in the present dispute except that this respondent does not believe that any question concerning Amendment XIV, Section 1, United States Constitution is raised either substantively or procedurally by this case.

The respondent feels it incumbent to emphasize the provisions of Section 28, Article II, of the Constitution of the State of Ohio since this provision was the basis of much of the controversy as the matter was approached by the petitioner and respondent in the Tenth District Court of Appeals of Ohio and the Supreme Court of Ohio. Although the Supreme Court of Ohio did not deem it necessary to deal in depth with the Ohio constitutional issue potentially involved herein, the respondent would hereby reassert its reliance upon its arguments made in the reviewing courts which have previously dealt with this matter.

Article II, Section 28, Constitution of Ohio provides:

> "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

(e) **Statement of the Case.**

The respondent agrees basically with the "Statement of the Case" as made by the petitioner on pages four through nine of his brief with the following qualifications:

1. The material concerning the role played by the amicus curiae, The National Association of Insurance Commissioners, in the Supreme Court of Ohio, (page 10 of petitioner's brief and "Appendix D", pages 97-98), which role was not sought by the amicus curiae until the filing of a motion for rehearing and reconsideration filed by the petitioner, are basically inappropriate under a categorization of "(f) Reasons relied on for the allowance of the writ." Additionally, the propriety of the petitioner's Appendices C (1), pages 92-93 of petitioner's brief, C (2), pages 94-95 of petitioner's brief, and D, pages 97-98 are of questionable propriety under Rule 23.3 of the Rules of Practice of this honorable Court.

2. The petitioner (page 8 of brief of petitioner) states that the Supreme Court of Ohio " . . . declined consideration of the question of retroactivity . . . " This represents a simplistic analysis of the decision of that court. The Supreme Court of Ohio definitely gave consideration to the issue of retroactivity. That court decided, that in view of the statutory language employed by the Ohio Legislature, no attempt was being made by the state legislature to make the provisions of Chapter 3955, Ohio Revised Code, retroactive in their operation.

3. As previously noted, the timeliness of the respondent's motion for reconsideration and rehearing in the Supreme Court of Ohio is in dispute.

4. This respondent will hereinafter be occasionally referred to as "Buckeye Union".

5. This respondent does not intend to challenge the involvement in this proceeding of Ken Bailey, et al. with the petitioner, Superintendent of Insurance of

Ohio or the statements contained in petitioner's brief on pages 18 and 19.

(f) **Argument.**

(i) **The issue presented is of transitory interest.**

The petitioner is requesting this Court to assume jurisdiction over a controversy which is ephemeral in nature. In a brief time, there will be no policyholders of Ohio Valley Insurance Company or claimants thereof. Moreover, as the date of the enactment of the Ohio Insurance Guaranty Act (as well as that of similar state legislation) becomes remote in time the possibility of similar situations arising diminishes. While the respondent would not suggest that this court close its doors to any worthy supplicant, the fact is that the petitioner has had this matter reviewed by three courts, five different times.

(ii) **The federal constitutional issue was not timely raised.**

The first time that any federal constitutional question was raised by any party was in a memorandum filed by the petitioner in support of a motion for rehearing and reconsideration of the decision of the Supreme Court of Ohio. That motion for rehearing and reconsideration was denied by the highest court of Ohio without opinion (q.v. page 22 of the petitioner's brief). The general rule which has been wisely adopted by this Court is that a federal question which is first presented on application or motion for rehearing in the highest court of a state, after a final decision of that court, and which is subsequently denied without opinion is raised too late to support the jurisdiction of this Court over the state court decision, *American Surety Company v. Baldwin*, (1932) 287 U.S. 156, 77 L. ed. 231, 53 Sup. Ct. 98; *Live Oak Water Users Assoc. v. Railroad Commission*, (1926) 269 U.S. 354, 70 L. ed. 305,

46 Sup. Ct. 149; *McGarrity v. Delaware River Bridge Commission*, (1934) 292 U.S. 19, 78 L. ed. 1095, 54 Sup. Ct. 565 (rehearing denied, 292 U.S. 607, 78 L. ed. 1468, 54 Sup. Ct. 771). Moreover, a review of the decision of the Supreme Court of Ohio will reveal that that court did not find it necessary to decide even a state constitutional question, let alone a federal constitutional question. The basis of its decision rests upon statutory construction derived from Ohio precedent.

The petitioner's assertion that a clear case of unjustifiable discrimination between claimants of the Ohio Valley Insurance Company first became apparent when the Supreme Court of Ohio held that the legislature intended to classify claimants according to the time relationship between their claims and the effective date of Chapter 3955, Ohio Revised Code, (brief of petitioner, page 17) is untenable. A dichotomy between those claimants whose claims arose prior to the effective date of Chapter 3955 and those whose claims arose subsequent to such effective date was very clearly created by the decision of the Court of Appeals of Franklin County, Ohio. Therefore, the so-called federal constitutional question which the petitioner would have reviewed was created, not by the Supreme Court of Ohio, but by the Court of Appeals of Ohio. If the petitioner wished to raise the federal constitutional question of discriminatory classification, he had ample opportunity in his motion for reconsideration directed to the Court of Appeals of Franklin County, Ohio, in his memorandum in support of jurisdiction directed to the Supreme Court of Ohio, and in his brief on the merits in the Supreme Court of Ohio. He chose not to raise such issue and should now be precluded from so doing.

The petitioner maintains (on page 18 of his brief) that the merits of his appeal are salvaged, regardless of the

timeliness of the manner in which he raised the constitutional issue. The cases relied upon by the petitioner, *Burton v. Wilmington Parking Authority,* (1961) 365 U.S. 715, 6 L. ed. 2d 45, 81 Sup. Ct. 856 and *Anonymous v. Baker,* (1959) 360 U.S. 287, 3 L. ed. 2d 1234, 79 Sup. Ct. 1157, are clearly distinguishable in two major respects: (1) a federal constitutional issue was raised in both cases at an incipient level of the controversies (i.e. in the *Burton* case in a Delaware Court of Chancery and, apparently, in the *Baker* case at the time that the proceeding progressed from a quasi-administrative hearing to that of a contempt proceeding); (2) this Court determined to hear these cases—not from any consideration of the timeliness in which the federal constitutional issue may or may not have been raised – but from a determination that the basis of the state court's decisions did not properly bring the cases within the purview of the statutory jurisdiction of this Court on appeal under 28 U.S.C., Section 1257(2), but that sufficient grounds had been raised to support review by the Court upon the allowance of petitions for writs of certiorari and the respective appeals would be so treated.

(iii) **The rationale of the decision sought to be reviewed rests entirely upon state law.**

The crux of the decision of the Supreme Court of Ohio (obviating the determination of a state constitutional issue) is that the intent of the Ohio Legislature can be determined from an analysis of the "operative language" employed in Chapter 3955, Ohio Revised Code, by application of a long series of decisions by the high court of Ohio which serve as precedent for such interpretation. As stated by the Supreme Court of Ohio:

> "A statute, employing operative language in the present tense, does not purport to cover past events of a

> similar nature. As a general rule, a statute is prospective in its operation 'unless its terms show clearly an intention that it should operate retrospectively.'" *Bernier v. Becker*, (1881), 37 O.S. 72, 74; *Allen v. Russell*, (1883), 39 O.S. 336, 339; *Cincinnati v. Seasongood*, (1889), 46 O.S. 296, 304; *Cincinnati, Hamilton & Dayton Rd. Co. v. Hedges*, (1900), 63 O.S. 339, 341; *Cowen v. State, ex rel. Donovan*, (1920), 101 O.S. 387. No such clear intention appears herein." *Smith v. Ohio Valley Ins. Co.*, (1971), 27 O.S. 2d 268, 276.

The decision of the Ohio Supreme Court, therefore, turned, not on any federal question or even state constitutional question, but rather upon Ohio precedents concerning statutory construction.

(iv) **The decision of the Supreme Court of Ohio is correctly circumspect in its scope.**

This case was consistently presented to the two reviewing courts of the State of Ohio by all parties actively participating in terms of an Ohio constitutional issue. That issue, as maintained by this respondent in the Supreme Court of Ohio,[2] was that requiring contributions to the Ohio Insurance Guaranty Association by insurance companies licensed to do business in Ohio (under Section 3955.01(D), Ohio Revised Code, membership in such association being required of practically all property-casualty insurers caring to do business in such state) was violative of Section 28, Article II, Constitution of the State of Ohio, which prohibits the general assembly of the state from passing retroactive laws. This provision further provides that this constitutional repugnance shall not apply to curative or remedial statutes.

---

2. This respondent advocated in the Ohio Court of Appeals the position ascribed to it on page seven of the petitioner's brief.

The substance of the controversy thus litigated between the petitioner and respondent became a contest to establish Chapter 3955 as either substantive law or remedial law. The very real importance of this distinction under Ohio law can be gleaned from a brief statement of the judicial interpretation which has been placed upon the Ohio constitutional provision concerning retroactive laws previously cited. As stated by the Supreme Court of Ohio in *State ex rel., Crotty, v. Zangerle,* (1938) 133 O.S. 532, 11 O.O. 226, 14 N.E. 2d 932:

> "However, every statute that is designed to act retrospectively is not retroactive within the terms of Section 28, Article II, of the Constitution of 1851, which forbids the General Assembly of this state to pass "retroactive" laws. Whether a statute falls within the prohibition of this provision of the constitution depends upon the character of the relief that it provides. *If it creates a new right, rather than affords a new remedy to enforce an existing right, it is prohibited by this clause of the constitution of this state.*" 133 O.S. 532, 535 (emphasis added).

Recently, Justice Herbert, speaking for the Supreme Court Ohio in dealing with the issue of the retroactivity of a provision of the Workmen's Compensation Law and the dichotomy between substantive and procedural or remedial stated:

> "It is doubtful if a perfect definition of 'substantive law' or 'procedural or remedial law' could be devised. However, the authorities agree that, in general terms, substantive law is that which creates duties, rights, and obligations while procedural or remedial law describes methods of enforcement of rights or obtaining redress. *State v. Elmore,* 179 La. 1058, 155 So. 896; *Manuel v. Carolina Casualty Insurance Company* (La. App.) 136 So. 2d 275, 277; *40 Words and Phrases* (Perm. Ed.) 857." *State ex rel. Holdridge v. Industrial*

Commission, (1967) 11 O.S. 2d 175, 178, 40 O.O. 2d 162, 228 N.E. 2d 621.

The decision of the Supreme Court of Ohio, by not emphasizing the controversy as presented to it by the parties, has affirmed that, through the language employed by the legislature, the act is prospective in nature which obviates resolving the controversy created by the petitioner and this respondent concerning substantive and remedial legislation. If the Ohio Court had decided that Chapter 3955, Ohio Revised Code, is substantive, a retroactive application of it is specifically prohibited by the Ohio constitution as judicially interpreted. If the same legislation is curative or remedial, then its application in a retrospective manner has been determined to be implicitly excluded by statutory construction by the Supreme Court of Ohio which is unquestionably cognizant that the Ohio constitutional provision provides that curative or remedial legislation "may" be, but need not be, in contradistinction to the initial prohibition against "retroactive laws" contained in Article II, Section 28, Constitution of Ohio.

Considering this background, it seems incumbent upon the petitioner to either (1) create a true issue with regard to the legitimacy of Article II, Section 28, Constitution of Ohio which must be determined to be in contravention of the supremacy clause of the Federal Constitution, Article VI, Section 2, Constitution of the United States; or, (2) show an unreasonable and arbitrary classification by the decision of the Supreme Court of Ohio violative of the Fourteenth Amendment to the Constitution of the United States.

The first of the two issues referred to above has not been raised by the petitioner.

With regard to the second issue, this Court has several times declared that time may be a reasonable basis of classification under the Fourteenth Amendment to the Constitution of the United States, *Williams v. Walsh*, (1912) 222 U.S. 415, 56 L. ed. 253, 32 Sup. Ct. 137; *Sperry & Hutchins Co. v. Rhodes*, (1911) 220 U.S. 502, 55 L. ed. 561, 31 Sup. Ct. 490. In this case, not only is time of origin a reasonable basis for classification of "covered claims", it is sanctioned by the state constitution.

The case of *Mayflower Farms v. Ten Eyck*, (1935) 297 U.S. 266, 80 L. ed. 675, relied upon by petitioner on pages eleven and twelve of his brief, is readily distinguishable from the present situation. Apart from the strong dissent rendered by Mr. Justice Cardozo and concurred in by Justices Brandeis and Stone, the case concerns an attempted alteration of the competitive market system in an area (milk production) where such regulation is neither traditional or obviously necessary. This is in direct contrast to the insurance industry where state regulation of all facets of the business is the rule and judicially justified as a business impressed with a public trust. Thus, this Court, in the *Mayflower* case, made this distinction:

> "The challenged provision is unlike such [regulatory] laws, since, on its face, it is not a regulation of a business or an activity in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date." 297 U.S. 266, 274; 80 L. ed. 675. (bracketed material added)

Buckeye Union also believes that the result in this case is fair in view of the reasonable expectations of all of the parties involved.

The people who ultimately bear the burden, should this statute be construed in the retroactive manner which

the petitioners urge would be the policyholders of mutual companies and stockholders of this respondent and others similarly situated. The stockholders of the Buckeye Union Insurance Company, at the time they invested in the company, certainly did not expect to have their investments diluted due to the insolvency of any other insurance companies. Their investment was in the Buckeye Union Insurance Company and that company alone. At the time that the policyholders and claimants of the Ohio Valley Insurance Company became such, prior to the enactment of Chapter 3955, Ohio Revised Code, they could not expect to look to the assets of any fund or corporation other than that of the Ohio Valley Insurance Company. Therefore, with respect to the stockholders of the respondent, the interpretation of Chapter 3955 urged by the petitioner would take from them a part of their investment by the application of legislation passed after the "fact", thus creating liability in a confiscatory manner. With regard to the claimants and policyholders of the Ohio Valley Insurance Company, they would have received a pure windfall or boon. For this reason, and regardless of the Ohio constitutional provision prohibiting retroactive legislation, the interpretation given the Ohio Insurance Guaranty Act by the Ohio Supreme Court provides a reasonable classification based upon time which deprives the stockholders and claimants of the Ohio Valley Insurance Company of no rights which were vested in them prior to such enactment and which preserves to stock companies including this respondent and their stockholders and to mutual companies and their policyholders those vested property rights possessed by them prior to the act.

(g) **Summary.**

The controversy presented to this Court does not present a major issue since the effects of the Ohio Supreme Court

decision as described by the petitioner will quickly diminish in importance as the Guaranty Act matures. It seems undeniable that no federal constitutional issue was raised in a timely manner since none was raised until a motion for rehearing and reconsideration was filed in the highest Ohio court and that motion was denied without opinion.

Moreover, the decision sought to be reviewed rests solely upon statutory construction of an Ohio legislative act by the Ohio Supreme Court.

The decision by the Supreme Court of Ohio was based upon a reasonable classification, dictated by the Ohio Constitution, and fair in its application.

For the foregoing reasons, this respondent respectfully urges this honorable Court to deny the petition for writ of certiorari.

WILLIAM L. SCHMIDT
42 East Gay Street
Columbus, Ohio 43215
Attorney for Respondent,
Buckeye Union Insurance Company

AFFIDAVIT OF SERVICE

STATE OF OHIO
COUNTY OF FRANKLIN } SS

The undersigned, William L. Schmidt, attorney for respondent, Buckeye Union Insurance Company, states that he has on the 10th day of January, 1972, served by mail printed copies of the foregoing brief of respondent, Buckeye Union Insurance Company, in opposition on William J. Brown, Attorney General of Ohio, State House Annex, Columbus, Ohio 43215, and William M. Lane, Caren, Lane, Huggard, Alton & Horst, 150 East Broad Street, Columbus, Ohio 43215, Special Counsel, attorneys for petitioner, Superintendent of Insurance of Ohio; Arthur Vorys and Thomas B. Ridgley, Vorys, Sater, Seymour & Pease, 52 East Gay Street, Columbus, Ohio 43215, attorneys for respondent, Ohio Insurance Guaranty Association; and on Thomas H. DeChant, Stewart & DeChant, 1014 Hippodrome Building, Cleveland, Ohio, attorneys for petitioners, Ken Bailey, et al., being all parties required to be served.

William L. Schmidt
WILLIAM L. SCHMIDT

Subscribed and sworn to before me this 10th day of January, 1972.

William H. Allyn, Jr.
William H. Allyn, Jr.—Notary Public
State of Ohio—Lifetime Commission

SUPREME COURT, U. S.

FILED
JUN 12 1981

81-782

IN THE

Supreme Court of the United States

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Petitioner,

v.

OHIO VALLEY INSURANCE COMPANY,
Defendant,

(BUCKEYE UNION INSURANCE COMPANY,
Intervening Defendant-Respondent),

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervening Defendant-Respondent),

(KEN BAILEY, ET. AL.,
Intervening Defendant-Petitioner).

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Memorandum of Intervening Defendant-Respondent, Ohio Insurance Guaranty Association

ARTHUR I. VORYS
52 East Gay Street
Columbus, Ohio 43215
Attorney for Intervening Defendant-Respondent,
Ohio Insurance Guaranty Association

(Continued Inside Front Cover)

Vorys, Sater, Seymour & Pease
Thomas B. Ridgley
Elbert R. Nester
52 East Gay Street
Columbus, Ohio 43215
Of Counsel

TABLE OF CONTENTS

	Page
Statement of the Case	2
Reasons Relied on for Allowance of the Writ	4
Certificate of Service	10

Table of Cases Cited

Brown v. Allen, 344 U.S. 443 (1953)	5
Ohio ex rel. Eaton v. Price, 360 U.S. 246 (1959)	5
United States v. Carver, 260 U.S. 482 (1923)	5

Table of Constitutional Provisions and Statutes Cited

Fourteenth Amendment, Constitution of the United States	5, 6, 7
Chapter 3955, Ohio Revised Code	2, 5
Section 3955.08(A)(2), Ohio Revised Code	2
Section 3955.10(A)(1), Ohio Revised Code	2

IN THE

Supreme Court of the United States

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,

Plaintiff-Petitioner,

v.

OHIO VALLEY INSURANCE COMPANY,

Defendant,

(BUCKEYE UNION INSURANCE COMPANY,
Intervening Defendant-Respondent),

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervening Defendant-Respondent),

(KEN BAILEY, ET. AL.,
Intervening Defendant-Petitioner).

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Memorandum of Intervening Defendant-Respondent, Ohio Insurance Guaranty Association

---

Statement Of The Case

The Ohio Insurance Guaranty Association (the Guaranty Association) is a non-profit unincorporated association created by the Ohio Insurance Guaranty Association Act, Chapter 3955, Ohio Revised Code (the Act). Effective September 4, 1970, the Act in general directs the Guaranty Association to step into the shoes of an insolvent insurer in order to protect all of such insurer's policyholders and claimants from economic hardship as a result of the insolvency. Among other things, the Guaranty Association is responsible for assessing its membership which consists of all insurers transacting and licensed to transact any type of insurance in Ohio covered by the Act, and using the proceeds of such assessments to pay valid covered claims of insolvent insurers to Ohio claimants and to provide a defense for policyholders of insolvent insurers.

Pursuant to Section 3955.10(A)(1), the Superintendent of Insurance of Ohio is responsible for notifying the Guaranty Association of the existence of an insolvent insurer not later than three days after the Superintendent receives notice thereof. Upon notification by the Superintendent, the Guaranty Association is then deemed "the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." Section 3955.08(A)(2). On November 27, 1970, shortly after the Act became effective, and while the board of directors of the Guaranty Association was organizing and drafting a Plan of Operation, the Common Pleas Court of Franklin County, Ohio, decreed that Ohio Valley Insurance Company (Ohio Valley) was insolvent. Pursuant to the Act, the Superintendent of Insurance notified the Guaranty Association that Ohio Valley was an insolvent insurer.

On December 9, 1970, Buckeye Union Insurance Company, intervening defendant-respondent, filed its cross complaint for declaratory judgment in the Common Pleas Court, challenging the applicability of the Act to the insolvency of Ohio Valley. Because of the challenge the Guaranty Association intervened in the action, taking a neutral position, however, as to the merits of the issues raised. It sought to have the issues determined, nevertheless, as it did not want to collect assessments from its members or pay covered claims of several million dollars at risk of having its actions thereafter declared illegal and void, and further did not want to raise false hopes of claimants and policyholders.

At each level of appeal in this case the Guaranty Association has taken a neutral position and has simply asked the respective courts to give it direction so that it might carry out the valid legal purposes of the Act by which it was created. If the Guaranty Association had proceeded to collect assessments from its members and to pay all claims of Ohio Valley without regard to whether they arose prior to or after the effective date of the Act, September 4, 1970, it would have undertaken to pay approximately $3,300,000 in allowable claims, although only $500,000 of that total would have been referable to covered claims, as defined by the Supreme Court of Ohio, being those claims which arose subsequent to September 4, 1970. Consequently, if the Guaranty Association had not sought direction from the various courts as this case was appealed and had it proceeded to pay all claims, it would have illegally collected and paid to claimants $2,800,000. Other guaranty associations in the more than 40 other states with statutes nearly identical to the Act have been faced with a similar dilemma. In fact, in Florida the guaranty association assessed its members and paid claims of an insolvent insurer, only to have a lower state court sub-

sequently find that its guaranty association act violated the state constitution, although recently reversed by the Supreme Court of Florida.

The Ohio Guaranty Association desires to do all that is required of it by law, to undertake the burdens and provide the benefits as they relate to Ohio Valley and two other insurance companies doing business in Ohio which have become insolvent. As the state court proceedings have proven, however, the Guaranty Association can only effectively step into the shoes of insolvent insurers after resolution of the constitutional issues which have been raised. For this reason the Guaranty Association supports the petition for writ of certiorari filed by the Superintendent of Insurance, hoping that the Supreme Court of the United States will, by taking the case and resolving the issues, provide the Guaranty Association with appropriate direction or eliminate it entirely by declaring the Act unconstitutional.

Reasons Relied On For Allowance Of The Writ

The Superintendent of Insurance of Ohio in his Petition for Writ of Certiorari relies upon Supreme Court of the United States Rule 19.1(a). Much of the petition of the Superintendent is devoted to whether the Supreme Court of Ohio "has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Those issues have been adequately briefed by the Superintendent of Insurance, and the Guaranty Association merely intends in this brief to state why it believes that "there are special and important reasons" for this Court to review on writ of certiorari the decision of the Supreme Court of Ohio in this case.

The Supreme Court of Ohio has concluded in this case that as a matter of statutory interpretation all claims

against an insolvent insurer which arose prior to September 4, 1970 are not "covered claims" as defined in Chapter 3955, Ohio Revised Code. The Guaranty Association supports the petition for writ of certiorari filed by the Superintendent of Insurance. The questions raised in that petition concerning the constitutionality of the Act as interpreted by the Supreme Court of Ohio, and specifically the issue of whether the Act violates the equal protection provisions of the Fourteenth Amendment of the Constitution of the United States, will be unresolved and may be the subject of further litigation both in Ohio and in numerous other jurisdictions unless this Court rules on the merits of the issues raised in the petition.

This Court has frequently stated that "the denial of a writ of certiorari imports no expression of opinion upon the merits of a case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1922). *See Brown v. Allen*, 344 U.S. 443, 491-2 (1952); and *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959). Consequently, a denial of a writ of certiorari in this case would be of no value as precedent if these identical issues are raised in other proceedings in Ohio or other states. Furthermore, because of the manner in which the issues of the constitutionality of the Act arose, initially on a motion for rehearing and reconsideration before the Supreme Court of Ohio, there is a serious question as to whether the issues have been decided as they relate to the application of the Act to the insolvency of Ohio Valley.

If this Court denies certiorari in this case, the question will remain as to whether the Supreme Court of Ohio has decided or disregarded the constitutional issues raised in the petition for writ of certiorari filed by the Superintendent of Insurance. The Supreme Court of Ohio denied the motion for rehearing and reconsideration without a written decision. The Guaranty Association agrees with

the position of the Superintendent of Insurance that, since the issues were raised before the Supreme Court of Ohio in the motion for rehearing and reconsideration, the Supreme Court of Ohio ruled on the merits of the issues when it overruled the motion. Nevertheless, refusal by this Court to consider the issues will leave open the serious question as to whether the Supreme Court of Ohio has ruled that application of the Act to the insolvency of Ohio Valley does not violate the equal protection provisions of the Fourteenth Amendment of the Constitution of the United States.

Presently, there are many disappointed claimants and policyholders of Ohio Valley with respect to claims which arose prior to September 4, 1970. As pointed out in the petition of the Superintendent of Insurance, the liquidator has estimated that there are $3,300,000 in allowable claims of Ohio Valley, but only $500,000 in claims arising subsequent to September 4, 1970. Unless this Court grants the writ of certiorari sought by the Superintendent of Insurance any one of these disappointed claimants or policyholders could raise the very constitutional issues set forth in the Superintendent's petition in further state or federal court proceedings. Such proceedings could result in delays of years before a final non-appealable decision has been rendered. The Guaranty Association has sought to carry out the responsibilities imposed upon it by the Act; but since December, 1970 the Association has been unable to function as it was intended to function because of this litigation. To prevent further delay in making clear the obligation of the Guaranty Association and the rights of claimants and policyholders of Ohio Valley, the Guaranty Association respectfully urges this Court to rule on the merits of the issues raised by the Superintendent's petition.

In addition to the Ohio Valley insolvency, the Guaranty Association has been advised by the Superintendent of

Insurance that Maine Insurance Company (and on January 6, 1972, that LaSalle National Insurance Company) is an insolvent insurer as defined by the Act. The ancillary receivership of that company is pending in Ohio in the case of *Kenneth DeShetler, Superintendent of Insurance of Ohio, Plaintiff, v. Maine Insurance Company, Defendant,* Case No. 244,358, in the Common Pleas Court of Franklin County, Ohio. Claimants and policyholders of Maine Insurance Company are directly affected by the decision of the Supreme Court of Ohio interpreting application of the Act to Ohio Valley, and will be affected by the decision of this Court on the petition for writ of certiorari. If this Court does not grant certiorari, the issue presented in the Superintendent's petition that the Act violates the equal protection provisions of the Fourteenth Amendment of the Constitution will be undecided as it relates to the insolvency of Maine Insurance Company and of any other insurance companies which become insolvent insurers in the future.

Further litigation in the Maine Insurance Company case and potential future insolvencies will create tremendous delays in the administration of justice under the Act. Thousands of court cases may be delayed unnecessarily at a time when judges and court administrators urge speeding up both civil and criminal dockets. For approximately one year all cases in which Ohio Valley is a party or in which it provides or is obligated to provide a defense have been stayed throughout Ohio by injunction pending final resolution of the issues in this case. A similar stay of all proceedings has been in effect for Maine Insurance Company for approximately six months. These stays have been necessary because if the Guaranty Association has no authority under the Act to provide a defense for policyholders of insolvent insurers, those policyholders must provide their own defense in each case. Many, if

not most, of the casualty companies in the United States which are now insolvent, including Ohio Valley, wrote high risk automobile insurance, and most policyholders of such companies have low incomes and can ill afford to defend themselves in court, let alone pay judgments which might be obtained by default while the courts are determining the meaning and constitutionality of the Act.

Presumably similar delays in the judicial process are occurring throughout the 40 states which have guaranty association acts similar to ours in Ohio. Until such time as the issues presented to this Court in the petition for writ of certiorari are finally decided, the intended purposes of the various guaranty association acts to protect claimants and policyholders and prevent delay in the payment of claims when an insurer becomes insolvent will continue to be frustrated, or guaranty associations will continue to hold out false hope to claimants and policyholders when in fact such associations can have no standing because they are creatures of unconstitutional statutes.

As pointed out in the petition of the Superintendent of Insurance the decision of the Supreme Court of Ohio is having and will continue to have a substantial impact in a number of jurisdictions other than Ohio, and similarly the decision of whether to grant the writ of certiorari sought in this case will also have substantial repercussions in the more than 40 states other than Ohio which have language in their respective guaranty association acts nearly identical to that of the Ohio Act. Ohio is the first state in which the courts have interpreted the application of the Act to a particular insolvency. However, the various guaranty association acts already have brought forth substantial litigation raising a number of common law and constitutional issues.

There is litigation pending in Florida, Louisiana and Arizona seeking resolution of issues which are in part

identical to those issues raised in the Ohio Valley case and this petition for writ of certiorari. By granting certiorari this Court can alleviate the confusion and turmoil throughout the more than 40 states with guaranty association acts similar to that in Ohio and can provide direction to the respective guaranty associations which must deal with existing insolvent insurers and their claimants and policyholders. Guaranty associations are being forced to forestall action because of the various lawsuits throughout the country questioning their legality. Even the guaranty associations in those states where no litigation is pending are looking carefully to the states where litigation is pending and particularly to this Court to determine what course of action should be followed with respect to the particular insurance company insolvencies in which they are currently involved.

Policyholders and claimants of insolvent insurance companies should be promptly protected. The Guaranty Association and presumably all other guaranty associations throughout the respective states are anxious to carry out the responsibilities legally and constitutionally placed upon them by the various guaranty association acts. The Guaranty Association asks that this Court consider and resolve the issues presented in the petition for writ of certiorari.

Respectfully submitted,

ARTHUR I. VORYS
52 East Gay Street
Columbus, Ohio 43215
Attorney for Intervening
Defendant-Respondent
Ohio Insurance Guaranty Association

CERTIFICATE OF SERVICE

The undersigned, Arthur I. Vorys, attorney for respondent, Ohio Insurance Guaranty Association, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the day of January, 1972, I served by mailing, in duly addressed envelopes, with first class postage prepaid, three printed copies of the foregoing Memorandum for Ohio Insurance Guaranty Association, on William M. Lane, special counsel for William J. Brown, Attorney General of Ohio, attorneys for petitioner, Superintendent of Insurance of Ohio; Stewart & DeChant Co., L.P.A., Thomas H. DeChant, 1014 Hippodrome Building, Cleveland, Ohio 44114, attorneys for petitioners, Ken Bailey, et al.; Caren, Lane, Huggard, Alton & Horst, Loren W. Peters, 150 East Broad Street, Columbus, Ohio 43215, of counsel; William L. Schmidt, J. Roth Crabbe, and William H. Allyn, Jr., Crabbe, Newlon, Potts, Schmidt, Brown & Jones, 42 East Gay Street, Columbus, Ohio 43215, attorneys for respondent, Buckeye Union Insurance Company, being all parties required to be served.

ARTHUR I. VORYS

52 East Gay Street
Columbus, Ohio 43215

LIBRARY
SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
FEB 3 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971 No. 71-782

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Petitioner,

v.

OHIO VALLEY INSURANCE COMPANY,
Defendant,

(BUCKEYE UNION INSURANCE COMPANY,
Intervening Defendant-Respondent),

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervening Defendant-Respondent),

(KEN BAILEY, ET AL.,
Intervening Defendant-Petitioner).

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONERS, SUPERINTENDENT OF INSURANCE OF OHIO AND KEN BAILEY, ET AL.

WILLIAM J. BROWN, Attorney General of Ohio
By William M. Lane, Special Counsel
150 East Broad Street
Columbus, Ohio 43215
Attorneys for Petitioner, Superintendent of Insurance of Ohio

(Continued Inside Front Cover)

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

STEWART & DECHANT CO., L.P.A.
THOMAS H. DECHANT
1014 Hippodrome Building
Cleveland, Ohio 44114
Attorneys for Petitioners,
Ken Bailey, et al.

LANE, ALTON & HORST, formerly
CAREN, LANE, HUGGARD, ALTON & HORST
LOREN W. PETERS
150 East Broad Street
Columbus, Ohio 43215
Of Counsel

IN THE

Supreme Court of the United States

FRED B. SMITH, SUPERINTENDENT
OF INSURANCE OF OHIO,
Plaintiff-Petitioner,

v.

OHIO VALLEY INSURANCE COMPANY,
Defendant,

(BUCKEYE UNION INSURANCE COMPANY,
Intervening Defendant-Respondent),

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervening Defendant-Respondent),

(KEN BAILEY, ET AL.,
Intervening Defendant-Petitioner).

The Superintendent of Insurance of Ohio and Ken Bailey, et al. (petitioners) believe that their petition for writ of certiorari and the memorandum of intervening defendant-respondent, Ohio Insurance Guaranty Association, clearly establish "special and important reasons" for review on certiorari as required by Rule 19 (a) of the Rules of this Court. Buckeye Union Insurance Company, intervening defendant-respondent (Buckeye Union) has, however, raised two specific points to which it is proper to reply under Rule 24.4 of this Court.

Buckeye Union has questioned, at pages 2 and 4 of its brief, the timeliness of the filing by the Superintendent of Insurance of Ohio of his motion for rehearing and re-

consideration in the Supreme Court of Ohio. That motion was timely filed, and the timeliness of its filing is not an issue in this Court because the Supreme Court of Ohio, by granting the National Association of Insurance Commissioners (NAIC) leave to file a brief amicus curiae on that motion and accepting the NAIC brief, in effect overruled Buckeye Union's motion to dismiss the motion for rehearing and reconsideration.

The Ohio Insurance Guaranty Association Act, Chapter 3955, Ohio Revised Code, as interpreted by the Supreme Court of Ohio, discriminates between claimants whose claims arose prior to the effective date of the Act and claimants whose claims arose thereafter. Buckeye Union, at pages 11 and 12 of its brief, attempts to justify the discrimination by claiming that its stockholders and others similarly situated would otherwise be unduly burdened by the losses of claimants whose claims arose prior to the effective date of the Act. This argument completely ignores the impact of Section 3955.17, Ohio Revised Code, which authorizes insurers to recoup their costs incurred in connection with insolvency of Ohio Valley Insurance Company by including such costs as one of the several prior experience factors upon which insurance companies base their policy rates. Obviously, no burden is imposed upon Buckeye Union and others similarly situated by application of Chapter 3955, Ohio Revised Code, for the benefit of all claimants against Ohio Valley Insurance Company.

Buckeye Union's argument, at pages 11 and 12 of its brief, is simply not relevant to the issue of discrimination in this case. The petitioners believe that whatever burden Buckeye Union may think it would suffer, which obviously cannot be economic, by permitting all claimants redress under the Act would arise not because of claims arising at a particular time, but because of the ultimate necessity of liquidating Ohio Valley Insurance Company.

Regardless of whether the necessity of liquidation of Ohio Valley Insurance Company is attributed to the volume of claims in relation to the company's assets, the character of the management of the company, the general economic conditions prevailing at the time the company became insolvent, or some other cause or combination of causes, it is patently unfair and contrary to Amendment XIV, Section 1, Constitution of the United States, to relieve Buckeye Union and others similarly situated from supposed burdens by requiring claimants accruing claims prior to an arbitrary date to absorb their own losses in addition to administrative expenses, while permitting claimants accruing claims after the arbitrary date to be made whole.

Buckeye Union's brief in no way diminishes the basis for granting review on certiorari set forth in the petition for writ of certiorari, nor does it in any way diminish the importance of review by this Court to the 40 or more states other than Ohio which have language in their respective guaranty association acts nearly identical to that of the Ohio Act. Petitioners, therefore, ask the Court, for the "special and important reasons" set forth in their petition and in the memorandum of intervening defendant-respondent, Ohio Insurance Guaranty Association, to consider and to resolve the issues presented in the petition for writ of certiorari.

Respectfully submitted,

WILLIAM J. BROWN, Attorney General of Ohio
By William M. Lane, Special Counsel
Attorneys for Petitioner, Superintendent
of Insurance of Ohio

By _____
Stewart & DeChant Co., L.P.A.
By _____
Thomas H. DeChant
Attorneys for Petitioners, Ken Bailey, et al.

CERTIFICATE OF SERVICE

The undersigned, William M. Lane attorney for petitioner Superintendent of Insurance of Ohio and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the _____ day of January, 1972, I served by mailing, in duly addressed envelopes, with first class postage prepaid, three printed copies of the foregoing Reply Brief of Petitioners, Superintendent of Insurance of Ohio and Ken Bailey, et al. on William L. Schmidt, 42 East Gay Street, Columbus, Ohio 43215, attorney for respondent, Buckeye Union Insurance Company; Crabbe, Brown, Jones, Potts & Schmidt, J. Roth Crabbe, 42 East Gay Street, Columbus, Ohio 43215, of counsel; Arthur I. Vorys, 52 East Gay Street, Columbus, Ohio 43215, attorney for intervening defendant-respondent, Ohio Insurance Guaranty Association; Vorys, Sater, Seymour & Pease, Thomas B. Ridgley and Elbert R. Nester, 52 East Gay Street, Columbus, Ohio 43215, of counsel, being all parties required to be served.

WILLIAM M. LANE

150 East Broad Street
Columbus, Ohio 43215